S. Hrg. 100-1062

MEDICAL MALPRACTICE SUITS FOR ARMED SERVICES PERSONNEL

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

S. 2490

A BILL TO AMEND CHAPTER 171 OF TITLE 28, UNITED STATES CODE, TO ALLOW MEMBERS OF THE ARMED FORCES TO SUE THE UNITED STATES FOR DAMAGES FOR CERTAIN INJURIES CAUSED BY IMPROPER MEDICAL CARE PROVIDED DURING PEACETIME

AND

H.R. 1054

A BILL TO AMEND CHAPTER 171 OF TITLE 28, UNITED STATES CODE, TO ALLOW MEMBERS OF THE ARMED FORCES TO SUE THE UNITED STATES FOR DAMAGES FOR CERTAIN INJURIES CAUSED BY IMPROPER MEDICAL CARE

JUNE 17, 1988

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MEDICAL MALPRACTICE SUITS FOR ARMED SERVICES PERSONNEL

FRIDAY, JUNE 17, 1988

U.S. SENATE,
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin (chairman of the subcommittee) presiding.

Also present: Senators Thurmond and Grassley.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. We will begin this hearing today on H.R. 1054 concerning malpractice suits for Armed Forces personnel. I am pleased to hold these hearings on H.R. 1054 and S. 2490. Both bills would create an exception to the *Feres* doctrine, thus allowing members of the Armed Forces to bring suit for medical malpractice.

Under current law, Armed Forces personnel who have suffered some injury as a result of medical malpractice have no recourse in our Nation's system of justice. Some in Congress have questioned whether the men and women who are serving our country in the Armed Forces are being treated fairly and equitably.

Essentially, both of these bills will grant to military personnel a right to sue for medical malpractice. However, both bills will continue the existing prohibitions on claims arising from foreign jurisdictions and during combat activities.

The Department of Defense has proposed an alternative to the above two bills. The DOD proposes that Congress amend the Military Claims Act to allow the Armed Forces to settle and pay claims for the death or personal injury of service members, where those injuries or deaths were the result of negligence of health care providers. DOD contends that a major advantage of such an approach is that it would cover U.S. military personnel injured overseas.

I look forward to the testimony of today's witnesses and hope to be enlightened, not only about the need for this legislation, but also regarding the manner in which Congress should proceed in correcting this area of possible injustice to the men and women of the United States armed services. We are pleased that Senator Sasser is with us, and we will be delighted to hear from you at this time, Senator Sasser.

[Copies of S. 2490 and H.R. 1054 follow:]

II

100TH CONGRESS
2D SESSION

S. 2490

To amend chapter 171 of title 28, United States Code, to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care provided during peacetime.

IN THE SENATE OF THE UNITED STATES

JUNE 9 (legislative day, JUNE 8), 1988

Mr. SASSER (for himself, Mr. MATSUNAGA, Mr. GORE, Mr. LEVIN, Mr. SIMON, Mr. PELL, Mr. METZENBAUM, Mr. KERRY, Mr. DECONCINI, Mr. INNOUYE, Mr. KENNEDY, Mr. CHAFEE, Mr. MELCHER, Mr. BAUCUS, Mr. RIEGLE, and Mr. SANFORD) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend chapter 171 of title 28, United States Code, to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care provided during peacetime.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 171 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 2681. Certain claims by members of the Armed Forces of the United States

"(a) Claims may be brought under this chapter for damages against the United States for the personal injury or death of a member of the Armed Forces of the United States arising out of the noncombatant activities of the Armed Forces while such member is serving on active duty if the claim arises out of the negligence of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the Armed Forces acting within the scope of their office or employment in a hospital or other medical facility of the Armed Forces.

"(b) Actions brought pursuant to this section shall be brought in the appropriate court of the United States.

"(c) The remedy against the United States provided by this section shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim.".

(b) The table of sections for chapter 171 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"2681. Certain claims by members of the Armed Forces of the United States.".

SEC. 2. Section 2681 of title 28, United States Code, as added by the first section of this Act, shall apply only with respect to claims arising on or after the date of enactment of this Act.

○

I

100th CONGRESS
1st Session

H. R. 1054

To amend chapter 171 of title 28, United States Code, to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care.

IN THE HOUSE OF REPRESENTATIVES

February 9, 1987

Mr. Frank (for himself, Miss Schneider, Ms. Kaptur, Mr. Stark, Mr. Dellums, Mr. Udall, Mr. Bennett, Mr. Studds, Mr. Coelho, Mr. Dymally, Mr. Fauntroy, Mr. Smith of Florida, Mr. Williams, Mr. Edwards of California, Mr. Barnard, Mr. Coyne, Mr. Mrazek, Mr. Clay, Mrs. Collins, Mr. Dicks, Mr. Staggers, Mr. Eckart, Mr. Garcia, Mr. Hall of Ohio, Mr. Hoyer, Mr. Kolbe, Mr. Fazio, Mr. Matsui, Mr. Moakley, Mr. Owens of New York, Mr. Berman, Mr. Russo, Mr. Evans, Mr. Solarz, Mr. Sunia, Mr. Levin of Michigan, Mr. Roe, Mr. Ridge, Mr. Fish, Mr. Atkins, Mr. Donnelly, Mr. Slattery, Mr. Kildee, Mr. Dixon, Mr. Leland, Mr. Howard, Mr. Towns, Mr. Hyde, Mr. Frost, Mr. Hughes, Mr. Mineta, Mr. Glickman, Mrs. Boxer, Mr. DeFazio, Mr. Martinez, Mrs. Bentley, Mr. Conyers, Mr. Weiss, and Mr. Owens of Utah) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend chapter 171 of title 28, United States Code, to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CLAIMS FOR IMPROPER MEDICAL CARE.

(a) COGNIZABLE CLAIMS.—Chapter 171 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 2681. Certain claims by members of the Armed Forces

"(a) CLAIMS OF MEMBERS OF ARMED FORCES.—Subject to all the provisions of this chapter, claims may be brought under this chapter for damages against the United States for personal injury or death of a member of the Armed Forces serving on active duty or on full-time National Guard duty (as defined in section 101(42) of title 10), under the conditions prescribed in this section.

"(b) WHERE CARE PERFORMED.—The personal injury or death referred to in subsection (a) must have arisen out of medical or dental care furnished the member of the Armed Forces in a fixed medical facility operated by the Secretary of a military department or any other fixed medical facility operated by the United States.

"(c) DEFINITIONS.—For purposes of this section:

"(1) The term 'fixed medical facility' means a medical center, hospital, or clinic that is located in a building, structure, or other improvement to real property.

"(2) The term 'personal injury' does not include mental or emotional disability unless it is the direct result of a physical injury.

"(d) REDUCTION OF CLAIMS BY OTHER BENEFITS.—The payment of any claim for personal injury or death of a member of the Armed Forces under this section shall be reduced by the present value of other benefits received by the member and the member's estate, survivors, and beneficiaries, under title 10, title 37, or title 38 that are attributable to the personal injury or death from which the claim arose.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 171 of title 28, United States Code, is amended by adding at the end the following new item:

"2681. Certain claims by members of the Armed Forces.".

SEC. 2. EFFECTIVE DATE.

Section 2681 of title 28, United States Code, as added by section 1 of this Act, shall apply only with respect to personal injuries or deaths occurring on or after the date of the enactment of this Act.

○

STATEMENT OF HON. JIM SASSER, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator SASSER. Well, thank you very much, Mr. Chairman. I am pleased to be here before you today and I want to commend your calling this hearing, to look into the so-called *Feres* doctrine, which bars active duty military personnel from filing suit against the Government for military medical malpractice.

As you know, this is an issue that I have worked on for a number of years. I have a legislative proposal, S. 2490, which would greatly modify the so-called *Feres* doctrine. Now, the legislation which I am advancing is similar to the House-passed bill, sponsored and steered through the House in a very workman-like manner by Congressman Barney Frank.

The legislation would allow active duty military personnel to sue only for medical malpractice and only during peace time for noncombat injuries. The Government—not the individual doctors—would be liable for this medical malpractice. Now, I introduced this legislation because current law denies active duty military personnel basic civil protections that are accorded to other members of our society.

Military men and women are being left without a day in court after they have been victims of negligence and incompetent military medical care. You are, no doubt, familiar, Mr. Chairman, with some of the horror stories associated with the *Feres* doctrine. There is the now old case of an Army soldier, who experienced complications after surgery. Eight months later, a towel, 30 inches long and 18 inches wide was found in his stomach.

This whole problem came to my attention some years ago, when one of my constituents, a Navy Petty Officer lost the frontal portion of his skull, piece by piece, due to improper treatment of an infection. There is now no protection over the frontal lobe of his brain.

He must now wear a helmet-like device to protect his brain and in the event he should get up in the night without wearing this device and bump into the wall or some other object, then he could be killed because there is simply no bone protecting his brain from trauma.

Later this morning, you will hear from a mother whose son collapsed of heat exhaustion during a Navy basic training exercise He was placed in an ice bath at a Naval hospital to lower his 103 degree temperature. His temperature was allowed to fall to the dangerously low level of 92 degrees. Several of his vital organs were seriously damaged. He subsequently died from heart failure, brought on by an infection he contracted while in the hospital.

Now, to counter such examples, proponents of the *Feres* doctrine fall back on a familiar argument. They contend that allowing active duty military personnel to sue would undermine discipline and morale. Yet, under current law, the spouse of active duty military personnel can sue for medical malpractice. Active duty military personnel can sue on behalf of a dependent.

The argument that suits brought by active duty military personnel for medical malpractice would undermine discipline and morale, when the suits of spouses and dependents apparently do not, frankly, does not seem very credible. In other words, if the wife can sue or if the active duty military personnel can bring suit on behalf of a minor child who has been injured as a result of malpractice in the military medical system, how does it possibly damage discipline if the military person, him or herself, brings suit?

Let us take a closer look at this question of morale. I have worked closely with individuals who have been victims of military medical malpractice and I can tell you, Mr. Chairman, that it is hard to imagine what could be worse for a soldier's morale than the feeling that he or she did not get a fair shake from the Government that they volunteered to defend.

Now, I realize that when individuals join the armed services, they agree to give up certain rights in exchange for certain benefits and they agree to incur certain risks. But I doubt very seriously that any of the men and women on active duty today, who stand ready to give their lives in defense of this Nation and its interests, are ready to accept second-class citizenship status when it comes to adequate medical treatment and for seeking redress when they are the subject of medical malpractice in time of peace.

Indeed, even Federal prisoners in the Federal penal system have the basic right to sue for medical malpractice. Now, Mr. Chairman, the Department of Defense has made some important steps forward, I think, in the direction of improving the quality of medical care in recent years, since some of the original horror stories surfaced. And I want to commend DOD for that, but it is clear that we still have a long way to go.

The General Accounting Office studies I requested found several areas in which making better use of malpractice data would be helpful. There is a clear need for action here. The original study prompted GAO to take a look at other areas, such as credentialing and licensing of physicians, occurence screening for substandard care, and emergency medical treatment. These reports are due out in just a few months.

I look forward to the establishment of the Department of Defense Medical and Dental Review Board, which was to review malpractice claims involving active duty military personnel. DOD announced this initiative over a year ago. I was disappointed to learn that plans to establish this Board have now been scrapped.

I think, Mr. Chairman, in fact I know, that quality assurance is a goal we are all interested in achieving, as far as medical care for our military personnel is concerned. Conscientious oversight of individuals within the military medical system, who are on record for furnishing substandard care, is necessary if we are to achieve this goal, or systematic tracking of these health care providers would bring more accountability to the whole military medical system.

Even with improved quality though, there are bound to be cases of medical malpractice. The existing military and veterans' compensation systems are too often inadequate. Service members should have the right to sue in these cases. I firmly believe, Mr. Chairman, that our military personnel should not be reduced to the status of second-class citizens, in time of peace, when they have been subjected to medical malpractice resulting from noncombat wounds.

I am reminded of one constituent of mine, a Navy Petty Officer, who had a heart condition. He was taken to a Navy hospital for another complaint and was given medication that was contraindicated for patients with a heart problem, and he subsequently succumbed and died as a result of this gross negligence. His family, his wife and his children, were unable to recover as they would in a civil court, and his wife was left on an inadequate pension on which to support and raise a family.

The case of a young woman, active duty military personnel comes to mind. She was operated on; sponges were left in her following the operation. She learned later that she would never be able to have children as a result; yet, she was unable to seek adequate redress.

These things, these cases go on and on and I would submit, Mr. Chairman, it is time to upgrade our active duty military personnel to first-class citizenship and allow them the right that we accord every other American citizen, including convicted criminals in the Federal court system to sue for redress for injuries done their bodies as a result of malpractice and negligence in the military medical system in time of peace.

Mr. Chairman, I want to thank you and the distinguished members of this committee for allowing me to appear here this morning and give my views on this very important legislation.

Senator HEFLIN. Thank you. Senator Thurmond, do you have an opening statement?

Senator THURMOND. Mr. Chairman, to save time, I just ask that you place it in the record.

Senator HEFLIN. All right; fine.

[The prepared statement of Senator Thurmond follows:]

PREPARED STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

MR. CHAIRMAN:

We are here today to conduct a hearing on S.2490 and H.R.1054, bills which would allow active duty military personnel to sue the United States in federal court for injuries caused by improper medical care received at military medical facilities. S.2490, introduced by Senator Sasser, and H.R.1054 introduced by Congressman Frank, both amend the Federal Tort Claims Act to allow active duty members of the Armed Forces to collect damages for medical malpractice.

In Feres v. United States, decided in 1950, the Supreme Court held that the Federal Tort Claims Act barred suits by service members if the alleged injury was incurred "incident to service". Traditionally, the "Feres Doctrine" has been a bar to active duty members of the Armed Forces bringing medical malpractice claims. The legislation before the subcommittee today would make an exception to this longstanding principle and permit active duty members of the Armed Forces to sue the Federal Government for injuries caused by improper medical care performed at military facilities.

All of us recognize the sacrifices that our men and women in uniform make for this country. Their courage, morale, discipline, and health are essential to our national defense. I am concerned that S.2490 and H.R.1054 could endanger morale and discipline and will in all likelihood do little to improve medical service provided to members of our Armed Forces.

Additionally, S.2490 and H.R.1054 could lead to substantial financial liability on the part of the Federal Government. This factor must be taken into account as we consider these items of legislation.

In conclusion, before any major changes to the Federal Tort Claims Act are initiated, we must be certain of the ramifications of these changes. I look forward to the testimony of our distinguished witnesses who will appear today.

Senator **Heflin**. Senator Grassley, do you have an opening statement?

Senator **Grassley**. Mr. Chairman, I do not have an opening statement, but I want to tell you that I compliment you for taking up this issue. I have held hearings on this when we were in the majority and chairman of the committee. Although we never reached a resolution of the various points of view, I surely do not discourage you from doing that.

I also want to say that I have got to leave at 9:30 because of an agricultural drought meeting that we have with Secretary Lyng, but I do want permission, Mr. Chairman, to submit several questions for response in writing.

Senator **Heflin**. All right; fine. Thank you, all.

Senator Sasser, in looking at this overall issue, what are the distinguishing factors that separate this from the military as opposed to other departments of the Government? Let me give you a hypothetical.

A veteran who is or a Government employee who is operated on by a doctor who is a Government employee. Should it be open to them as well as to people of the military?

Senator **Sasser**. Well, we are dealing here, Mr. Chairman, purely with members of the military, but quite frankly, I think that all citizens of this country, who are subjected to negligent medical attention or malpractice by physicians in the employment of the U.S. Government ought to be able to seek legal redress, civil redress, in the courts of this country.

As I said, we are dealing here primarily with our active duty military personnel who are barred, by the so-called *Feres* doctrine, enunciated by the Supreme Court, which indicates that they cannot seek recovery from malpractice.

Senator **Heflin**. Well, in private business, an employee, who is operated on by a company doctor, has workmen's compensation as a remedy.

Should we extend beyond what we presently have as a concept at the private level into the public level?

Senator **Sasser**. Well, Mr. Chairman, I may be in error on this, but to take the chairman's hypothetical—if a workman, who is operated on by a company doctor, is the subject of malpractice, it is my view and my opinion that the workman would have a right of action over and above and against the physician for malpractice.

Senator **Heflin**. Well, there may be differences among the States, because each of the States have various workmen's compensation. I was just curious.

Do you believe that the Department of Defense's plan to amend the Military Claims Act which would allow for payments for medical malpractice practice, in that it will cover all members of the armed services and not just those stationed in the United States; would this adequately remedy the current problem in this area?

Senator **Sasser**. Well, I think it would be an improvement over the current situation, but I do not believe that it would be an adequate remedy. I firmly believe that military personnel ought to have the same remedy that other citizens have for medical malpractice in time of peace.

Now, I can follow the Department of Defense's argument in time of war, but here in peacetime, when we are expending literally hundreds of millions of dollars on a military medical system, buying the most up-to-date technology that is available, there is just no excuse, in my view, for active duty military personnel not to have the same right of action as other citizens do, particularly when their wives and children, who are treated in the military medical system, do have that right of action.

Senator **Heflin**. Senator Grassley, do you have some questions?

Senator **Grassley**. No, I don't.

Senator **Heflin**. Senator Thurmond.

Senator **Thurmond**. Thank you; I have just a few.

Senator Sasser, we are glad to have you with us. It is an honor to have you before this committee.

Senator **Sasser**. Well, thank you, sir. It is always a pleasure to appear before you.

Senator **Thurmond**. Senator Sasser, some argue that rather than enacting this legislation, it might be better to recruit more qualified medical personnel and mandate better continuing medical training.

What is your reaction to this position as opposed to enacting the legislation?

Senator **Sasser**. Well, Senator Thurmond, I think we ought to go down a double track on this. Clearly, we need to do everything we can to get first-class personnel into the military medical system, to retain those who are excellent, and they need to be subject to supervision and to proper peer review. As I said earlier in my testimony, the Department of Defense is making some progress in that regard and, I hope, some substantial progress.

But even with a state of the art military medical system, one that would be equal to or better than the vast civilian system, there are occasionally going to be cases of malpractice or negligence that occur—negligent treatment that will occur, as long as you have a system run by human beings.

So, I think we ought to allow those who are damaged, many times irreparably, by this negligence or malpractice, to have a right to recover for it. But that is not to say that we should not drive as hard as we can to have a first-class military medical system.

Senator **Thurmond**. Senator, the *Feres* doctrine has been in effect, I believe, since 1950.

Do you believe that it continues to serve a useful purpose?

Senator **Sasser**. No, Senator, I do not; not as it relates to my bill, S. 2490. The rationale given for keeping the *Feres* doctrine in place is that it would damage discipline in the military if it were repealed. That is, the principal reason given is that it would damage morale. I think just the contrary.

In discussing this whole matter with military personnel, including some of our colleagues, I might say, to my distinguished friend from South Carolina, who have served in the military during long periods of their lives. They indicate to me that it would actually enhance morale in the military if military personnel thought that they had the right to seek proper redress, as other citizens do when they are the subject of malpractice or negligent medicine.

Senator **Thurmond**. Senator Sasser, some believe this legislation would hurt morale because service people who suffer similar injuries in the military service would be treated differently. For example, a service man who loses a hand in combat versus one who loses a hand due to medical malpractice would be treated differently.

I believe your bill allows a person who loses a hand due to malpractice, to seek a greater financial recovery. Could you please discuss your views on that question?

Senator **Sasser**. Well, in time of peace, one who loses their hand as a result of malpractice or negligence, under my legislation, would be allowed a right of recovery in the court system for that. In time of combat, if one loses their hand—number one, they have the honor of being wounded in the service of their country in time of war. They get a Purple Heart. There are other distinctions that go with that.

We have to realize that in time of combat, we can't hold our physicians to the same standard of care that we would in time of peace. For example, if you've got a surgeon operating in a field hospital, a quarter of a mile behind the front lines; he's been up for 48 hours with mortar shells bursting all around him, you're not going to hold him to the same standard of care as you would a surgeon operating out here at Bethesda Hospital with the finest medical appliances that money can buy around him and surrounded with nurses and anesthesiologists and all of the things that are necessary for first-class medical care.

I think we would excuse, in time of combat, what we would say in peace time conditions might be malpractice or even, on occasion, negligence.

Senator **Thurmond**. Some people feel one serving in combat deserves more credit than in peace time. So, I want to get your view on that.

Senator **Sasser**. Well, I don't disagree with that, Senator, but I would say that if you've got military personnel who are subjected to a third or fourth rate military medical system in which routinely, they have to accept poor care, negligent care, medical malpractice as being practiced upon them, I think you'll find, in the not too distant future, that we'll have even more difficulty attracting people to the all-volunteer service.

One of the attractive features of service in the military used to be an excellent comprehensive medical care system that was with the military person as long as he or she was on active duty. And if they served to retirement, it was available to them after retirement. That was one way of attracting and keeping first-class military personnel. I'd like to return to that.

Senator **Thurmond**. Thank you, Senator.

Senator **Sasser**. Thank you very much, sir.

Senator **Thurmond**. That's all, Mr. Chairman.

Senator **Heflin**. All right. Thank you, Senator Sasser.

Senator **Sasser**. Thank you, Mr. Chairman.

Senator **Heflin**. We are delighted to have Congressman Barney Frank as our next witness.

STATEMENT OF HON. BARNEY FRANK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. **Frank**. Thank you, Mr. Chairman. It's a pleasure to be here. Your colleague, Senator Thurmond, and I will be engaged shortly—I'm glad to be able to tell him—we will be in conference on an ethics bill, Senator, this year and we'll get a bill through.

Senator **Thurmond**. And I congratulate you on the good work in getting action on it.

Mr. **Frank**. Thank you.

I think Senator Sasser has read out the case very well. I thought I might just respond to a couple of points that were raised. One was the problem that might come to morale if a soldier who lost his hand in combat was not compensated and a soldier who lost his hand due to malpractice was. With all respect, I do not think it would be great for morale to say to the members of the armed services, because something bad might happen to you in combat and you won't be compensated for it, we're going to make things even by making sure that you don't get compensated for a similar thing that happens outside of combat.

I came across a phrase that seemed to be very relevant to that, which says, "We have stressed the principle that nonuniform recovery is always worse than uniform recovery." And I would commend the words of Justice Scalia to the Members of the Senate here.

That was from Justice Scalia, who in his most recent decision on this case—he was, unfortunately, in the minority because the majority said that this has been around for awhile and if Congress wants to change it—it's a matter of statutory construction—Congress should do it. Justice Scalia referred to the quote, "Widespread, almost universal, criticism" *Feres* has received.

Senator Heflin asked some good questions about differential treatment. I think the relevant point here is, if you are a civilian employee of the Pentagon and you are operated on by Pentagon doctors and you are the victim of malpractice, you can sue. And if you are the civilian employee of any other Government department and you are operated on, you can sue. So, the burden of proof of justifying the exception, it seems to me, is on those who would deny that to people in the armed services.

Everybody in the United States, Federal prisoners, private citizens, everybody who happens to be here can sue the United States Government under the Federal Tort Claims Act for malpractice, except active duty members of the armed services. I don't think that is justifiable. Active duty Members of the armed services would, even if we passed this bill and sent it to the President and got it signed, still be given less rights. No one claims that this fully empowers them.

When you are in the armed services, you are clearly somewhat more restricted than as a private citizen. But it seems to me, in our duty as members of Congress, to show our respect and our gratitude and our admiration for the young men and women who serve us, that we ought to limit those disabilities to those that are necessary.

The only arguments that I have heard against allowing this limited right as well, it would undermine morale because a junior officer or an enlisted person would be allowed to sue a superior officer. Nothing in the bill that I sponsored that passed the House or in the bill that Senator Sasser has, empowers any enlisted person to challenge an officer on the spot. No enlisted person would be empowered under this to make a citizen's arrest of a doctor against whom he or she charged malpractice.

What we have is that subsequent to medical treatment, after consulting an attorney, the enlisted person or the junior officer could bring a lawsuit. I submit that that does not in any way endanger morale. If the notion is that we would then be admitting to enlisted people and junior officers that their superiors are not 100 percent of the time always right, I submit that I think they know that.

I do not think that it will come as an enormous surprise to anybody to know that senior military personnel in the medical field, as any of the rest of us, can make mistakes. I agree with Senator Thurmond. We have a responsibility to make the medical care as good as we can, but I would disassociate myself with Senator Sasser's answer.

There are going to be problems in any system. I am not one who accuses the military medical system of being worse than any other. I haven't seen any evidence of that. I think these are people who try very hard, sometimes under adverse conditions. Sometimes it may be our responsibility that we haven't given these medical people the kind of facilities they ought to have to treat these young people to whom we owe so much. But mistakes will happen.

Finally, I would say, there's been a lot of criticism about the tort liability system and medical malpractice. Most of the things that have been criticized aren't in the Federal Tort Claims Act. There are, after all, no punitive damages allowed. There are no jury trials. There is, I think, a reasonable procedural framework. The final point is that the doctors themselves are not personally liable. So, we don't have the problem of this causing soaring malpractice rates.

As a matter of fact, given the limitations that now exist under the Federal Tort Claims Act dealing with malpractice, $50 million a year is paid out, very little of it from the Defense Department. It comes out of the Justice Department's claim fund. Only $50 million is paid out for military medical malpractice. Now, two-thirds of the people treated in military medical facilities are eligible to bring malpractice suits because they are not active duty service personnel. They are retirees, spouses, children.

The CBO has estimated that this bill would cost us $25 million—one-third more. I mention that because that shows that we are not dealing with the kind of problems that have lead to soaring malpractice rates. A total payout of $75 million a year is less than the liability insurance that is paid, I am sure, in many, many areas of the country. So, I think it is containable. This is a very narrow exception. And yes, it would leave some inconsistencies.

I would say finally, that I have found, in my conversations with members of the armed services, that they regard this as I regard it—as a very promilitary bill. We owe a lot to these young people.

We ought to do this. I know that the Pentagon has said, well, maybe we should allow them to be compensated through our regular administrative system.

Frankly, they never said that until we got this bill through. And as this bill becomes less likely to pass, they become less eager, it seems to me, about that. I said I'd be willing to talk to them about an alternative way to deal with it, but that hasn't happened. Now that you, Senator, have very graciously consented to hearings, my guess is, their interest in these discussions might wax again.

I thank you for your attention, gentlemen.

Senator HEFLIN. What about the Veterans' Administration aspect of this? I'll give you a scenario. A musician, a violinist, loses three fingers overseas during combat, but the loss of the fingers is due to the malpractice. He has to go to the Veterans' Administration. He has a schedule—fingers are put on a certain schedule. He may be 20 percent disabled.

He could prove that he had a career as a violinist and that the loss of his three fingers totally disabled him from his ability to carry on his profession that he'd had beforehand. Consequently, his future and his life were totally ruined.

Would his compensation, as opposed to one in combat, create problems, particularly in regard to those that are wounded in combat with a similar injury than those who go to medical facilities and receive, as a result of it, injuries? I mean, the veterans aspect of this thing and service-connected——

Mr. FRANK. Well, let me say, Senator, first, as far as the VA is concerned, this does not affect whatever you could vis-a-vis the VA because once you get to the VA, you're a veteran and if you're not on active duty, you can sue under the Federal Tort Claims Act.

Senator HEFLIN. In other words, you can draw Veterans and——

Mr. FRANK. No, in our bill—and of course, you could do it a different way—we do have an offset in our bill. We would not allow a double collection. I think Ms. Cummings can explain to you. I can show you the provision. But in our bill, we do have an offset. It's in our bill at page 4.

> The amount of an award at judgment on a claim under this section for personal injury or death by a member of the armed forces shall be reduced by the agency making the award or the court entering the judgment, as the case may be, by an amount equal to the total amount of other monetary benefits received . . .,

et cetera. So, on pages 4 and 5 of our bill, beginning with line 22, we do have an offset.

As to the other part, I do—it is not often that I get the opportunity to commend to Senator Thurmond, the wisdom of Justice Scalia, so I will avail myself of it again. When Justice Scalia says in the case of *United States* v. *Johnson,* "As we have pointed out in another context, non-uniform recovery cannot possibly be worse than what *Feres* provides, uniform non-recovery."

I think, from the standpoint of the armed services, this is a fairly limited right we are giving these people. I realize there will be other cases. If we pass the bill that the House passed or Senator Sasser's version, which is a well-drafted version, active duty members of the armed services would still have fewer rights than the rest of us. I think that is inevitable in the situation which they have volunteered to serve and we try to do as much as we can for them. I just think we should minimize those disabilities.

I would also say that I will be working with the Pentagon. A case recently came to my attention, frankly, of a young man in the armed services who received a broken neck in an automobile accident, while returning to duty, so it was duty-connected. He was in a private hospital. He was transferred to an Army hospital. They never noticed that his neck was broken.

He was subsequently engaged in activities as a member of the armed services, which exacerbated the injury. There is some unhappiness on my part and some others because he was later separated without any disability and we want to pursue that. But I do think that in those situations, it's not that somebody was third-rate medicine overall. These mistakes will happen and it bothers me that our young people aren't better connected in this case.

Senator **Heflin**. You mentioned some estimates of cost. What are the estimates as to how much H.R. 1054 and S. 2490 will cost?

Mr. **Frank**. The House estimate was $25 million additional and CBO arrived at it in this fashion—$50 million is now paid out, out of the judgment claim primarily, to settle malpractice claims or pay them off for military medicine now. Two-thirds of those who use military medicine now are eligible to sue because they are spouses or other dependents or veterans.

What the CBO said was, they had no reason to think that the experience with the one-third of the population that can't sue would be any different than with the one-third that could. There are offsets. Some of the people who can sue are older and so that means that that population may use medical care more. On the other hand, these younger people are engaged in more physical activity.

At any rate, CBO's best estimate was that a straight-line projection would work and that if it's $50 million that we pay out now for the two-thirds that can sue, we would assume $25 million for the one-third that can't. So, the total costs that they give us—and this was not challenged in our discussions by the Pentagon or anybody else—was $25 million.

Senator **Heflin**. Senator Thurmond.

Senator **Thurmond**. I was just thinking. Suppose a soldier is out in the field and the captain is very negligent and causes a man to lose his hand. Now, under that scenario, he would not get this—he couldn't sue, right?

Mr. **Frank**. Right; he could not sue.

Senator **Thurmond**. On the other hand, if malpractice causes the hand to be lost, he could sue?

Mr. **Frank**. He could.

Senator **Thurmond**. That concerns me somewhat. I'm not going to close my mind, but——

Mr. **Frank**. Well, Senator, I appreciate that, but I think let's look at it from the standpoint of the soldier. We say that because—I would agree with you in particular if there were a class of soldiers who were likely to get involved in one set of problems and a somewhat separate class in another, then you would have a morale problem because you would say, hey, you guys, who might lose your hand in these field exercises, you won't be compensated, but this class will.

But as we know, any single member of the armed services is virtually, at the outset, equally liable to engage in either one. We don't want to give anyone the impression that this is prevalent. They aren't dropping hands like teacups over there at Walter Reed. I mean, I don't want to exacerbate—we're not trying to exaggerate the situation. But we are saying this.

To the extent that there's a danger, each individual soldier faces a danger that they may be injured in combat, he may be injured in a field exercise, he may be a victim of malpractice. I think—and here's where I think Justice Scalia is right—it's not good for his morale to say, look, because we don't want to undermine field discipline and command and control, because inevitably, in that situation, we won't be able to compensate you if something bad happens, here's what we're going to do for you.

We're going to tell you that if something bad happens to you in an unrelated way, we won't compensate you there either. Aren't you happy? Haven't we improved your morale? I think it's better to say to him, look, there are inevitably, given the nature of what you have volunteered to do, for which we are very grateful, some things for which we can't compensate you.

We will make sure that we compensate you in every other way and I do think that the considerations that say, do not undermine the judgment of the captain in the field, that they don't apply to the captain in the white coat, who's operating, especially where that captain will not be sued individually, will not be personally liable for any monetary judgment.

Now, as to the extent that the captain might be personally disciplined, we—you and I—hope that happens now if the malpractice is of a particularly outrageous sort, if it's a recurring pattern, then we would hope that somebody would look into it. So, I do think that from that standpoint you mentioned, yes, there will always be inconsistencies. I think it's in the interest of the soldiers 'morale to have fewer of them.

Rather than the inconsistencies between one soldier and another, let's look also at the inconsistencies between the soldier and everybody else in our society. And I think the morale of the solider is better served by what Justice Scalia says to the soldier, we're going to give you a non-uniform right of recovery and that's better than giving you a uniform right of nonrecovery. And I agree with Justice Scalia.

Senator THURMOND. Thank you, Mr. Chairman.

Senator HEFLIN. Thank you, Congressman Frank, for your testimony.

Mr. FRANK. Thank you, Senator.

Senator HEFLIN. The next witness is a panel of Ms. Kathleen Buck, General Counsel, Department of Defense and Mr. Brent Hatch, Deputy Attorney General, Civil Division, Department of Justice. Ms. Buck, we'd be delighted to hear from you.

STATEMENT OF A PANEL CONSISTING OF KATHLEEN BUCK, GENERAL COUNSEL, DEPARTMENT OF DEFENSE, ACCOMPANIED BY BRIG. GEN. JOHN FUGH, ASSISTANT JUDGE ADVOCATE GENERAL FOR CIVIL LAW, U.S. ARMY; AND BRENT O. HATCH, DEPUTY ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

STATEMENT OF KATHLEEN BUCK

Ms. BUCK. Thank you, Mr. Chairman. I'm delighted to be here this morning—and Senator Thurmond. First, I would like to introduce Gen. John Fugh, who is the Assistant Judge Advocate General of the Army for civil law, and who is accompanying me here today and, of course, as you noted at the beginning, Mr. Hatch, an official of the Department of Justice.

I am pleased to appear before you today to present the views of the Department of Defense on the importance of retaining the *Feres* doctrine and to discuss the Department of Defense's alternative proposal, which would provide additional compensation to the active duty victims of medical malpractice through an existing administrative procedure that we have in the Department.

I have submitted a prepared statement addressing these matters in detail and I ask that it be made a part of the record so that I can highlight several important points this morning.

In deciding *Feres* v. *United States* in 1950, the Supreme Court held that active duty military personnel may not sue the United States for torts incident to their service, including medical malpractice. The principle enunciated in *Feres* does not prevent those who are not on active duty—that is, retirees and dependents of active duty and retired personnel—from suing for malpractice.

This rule of law is necessary, in the opinion of experienced military leaders, so as not to undermine a disciplined, well-ordered fighting force. The *Feres* doctrine has been wisely and repeatedly reaffirmed in the last 38 years, not only by the Supreme Court, but also by Congress, which has consistently declined invitations to erode it.

Two pending bills, S. 2490 and H.R. 1054, if enacted, would lead to the evisceration of the *Feres* doctrine by permitting active duty service members to sue the United States in Federal court for malpractice occurring in specified DOD health care facilities. As I explain in my detailed statement, either bill would strike at the good order and discipline that are the foundation of any effective fighting force by providing a vehicle for challenging the authority of command.

If these bills were to become law, that would, in my opinion, just be the beginning of the destruction of the *Feres* doctrine and the end. An environment in which service members would freely and frequently sue the United States would not be far behind. Permitting military personnel to sue for medical malpractice would signal both to the courts and society at large that the Congress does not object to service members taking the Government into court for alleged negligent acts.

But, as the Supreme Court and Congress have recognized again and again, military life and civilian life are vastly different. To allow litigation for damages in the military would jeopardize unit cohesiveness and would, therefore, compromise the Department's ability to safeguard the national security. The proposed legislation suffers from at least three defects, any one of which would be fatal.

First, as I have just mentioned, it would create a vehicle for challenging military decisions through Federal Tort Claims Act litigation. For example, decisions about a service member's physical or mental qualifications for a particular assignment or the separation of a soldier from the service could be attacked on the grounds they rested on faulty, negligently-derived medical determinations.

Second, the bills would erode the uniformity of benefits to which military personnel are entitled. The bills threaten a basic principle—uniformity, consistency, and fairness are vital to the preservation of good order and discipline in an armed force. The proposed legislation threatens this principle and seeks to replace it with special rights based on the circumstances and status of an injury.

Indeed, the proposed bills provide a remedy for military members who suffer malpractice in the United States, but ignore the almost 500,000 military members assigned overseas. Thus, almost 25 percent of the Armed Forces would be denied the remedy for malpractice provided by either H.R. 1054 or S. 2490, to the other 75 percent of military personnel.

Imagine the devastating impact on morale and discipline from this disparate and inexplicable differentiation. In contrast, the current no-fault mechanism for compensating injuries incident to the military service is fair and efficient, unlike the clogged and often capricious civilian tort system.

Third, providing the opportunity to sue in tort will, in no way, improve medical care for military personnel. Already, 70 percent of the patients served by military medical facilities may sue for malpractice. It defies common sense to assert that allowing the remaining 30 percent to litigate under the Federal Tort Claims Act, would achieve any beneficial effect upon the quality of health care.

Any argument that military physicians provide better care to those who may sue for malpractice is insulting to this dedicated group of professionals who are bound by the same ethical requirements in treating all of their patients. Moreover, this kind of argument ignores the fact that military health care providers are immune from individual suit for malpractice under the Gonzales Act.

Allowing another class of individuals to sue would simply have no bearing on the quality of military medical care. In short, although the Department strongly opposes modification of the *Feres* doctrine, we are equally committed to seeing that the compensation of military personnel injured because of their service be fair.

These twin themes—the continuing vitality of the *Feres* doctrine in assuring a well-disciplined and cohesive force and the necessity for just compensation, have been consistently emphasized by the Department in opposing proposals that would force the Federal courts to interfere in the military decisionmaking process.

We have repeatedly stressed the Department's willingness to explore possible solutions on the issue of how to award fair compensation, while not threatening to undermine military discipline. The Department, therefore, supports enactment of its proposal to amend the Military Claims Act. This proposal would authorize active duty military personnel to file administrative claims for alleged malpractice of Department of Defense health care providers.

Although, also violative of the uniformity of benefits principle, this approach has significant advantages over amending the Federal Tort Claims Act. The Military Claims Act would apply to military personnel regardless of where they are assigned. The proposed bills would cover only personnel who suffer malpractice in the United States.

The Military Claims Act would not put courts in the untenable position of second-guessing military decisions, nor would it disrupt military operations by making service members subject to the orders, dockets, and schedules of judges and lawyers. The Military Claims Act is efficient. It would build upon an existing administrative system that can readily accommodate the additional cases that would arise under amendment to the act.

The Military Claims Act would avoid litigation costs, and under the administration's proposal, would limit attorneys' fees to 10 percent of the award, substantially less than under the proposed bills which would allow lawyers to take fees of 20 percent, even if the case is settled administratively, and 25 percent if it goes to court.

The proposed bills would also burden the service member with litigation costs which often are substantial, and force the member to seek relief in a court system that is already clogged. Moreover, relief under the Military Claims Act is generally provided much faster than waiting on the already overburdened court system.

Senator HEFLIN. Ms. Buck, we usually have a 5-minute rule here. If you can, try to summarize your testimony.

Ms. BUCK. Yes, sir; I think that I am just about finished here.

In other words, the Military Claims Act provides an unbiased review of claims by trained judge advocates who are independent of the medical personnel who provided the care in question. For over 30 years, this system has worked very well for claimants who are not barred by *Feres*.

In conclusion, a comprehensive review of current benefits for all types of injuries and illnesses would be preferable to culling out for favored treatment, a single class of service members whose injuries are attributable to medical malpractice.

I would be happy to answer any questions that you might have.

Senator HEFLIN. Thank you.

[The statement of Ms. Buck, along with responses to written questions, follows:]

STATEMENT OF

KATHLEEN A. BUCK
GENERAL COUNSEL
DEPARTMENT OF DEFENSE

BEFORE THE
SUBCOMMITTEE ON COURTS AND
ADMINISTRATIVE PRACTICE
SENATE COMMITTEE ON THE JUDICIARY

ON THE FERES DOCTRINE AND MILITARY HEALTH CARE

JUNE 17, 1988

Chairman Heflin and Members of the Subcommittee:

I am pleased to appear before the Subcommittee today to present the views of the Department of Defense on S. 2490 and H.R. 1054, bills which would allow certain active-duty members of the Armed Forces to sue the United States for damages for injuries caused by improper medical care. I also appreciate the opportunity to discuss the merits of the Administation's proposal to amend the Military Claims Act ("MCA") to allow all active-duty military members to file administrative claims for medical malpractice.

Since its opinion in Feres v. United States, 340 U.S. 135 (1950), the Supreme Court has interpreted the Federal Tort Claims Act ("FTCA") as barring suits by servicemembers alleged injury was incurred incident to service. While we understand the arguments of those who oppose application of the Feres doctrine to medical malpractice claims, for the reasons we have stated in the past we do not believe the doctrine to be unfair or unreasonable in the context of medical malpractice. The relationship between members of the Armed Forces and their superiors is genuinely unique, with no analogous civilian counterpart. Delivery of medical care to members of the Armed Forces is inextricably intertwined with numerous aspects of military policy and decision making.

The Supreme Court's holding Feres was based on three considerations. First, permitting tort actions would adversely affect military discipline, morale, and effectiveness. Second, there is an elaborate system of compensation for military personnel injured incident to service that is available regardless of fault. Third, the Court noted the distinctly federal relationship between servicemembers and their Government. Because of this relationship, which permits the Government and not the member to select his or her duty station, it would be unfair to make recoveries dependent on disparate state laws, as is required under the FTCA. Indeed, as I will describe later in this statement, the FTCA does not even permit a suit, much less a judgment, against the United States for torts occurring in foreign countries, where many servicemembers are assigned.

As you know, S. 2490 and H.R. 1054 would partially abrogate the Feres doctrine. Neither bill is as straightforward or as simple as may appear at first blush; both would generate litigation far out of proportion to the proposed remedy. For example, the terms "peacetime" and "noncombatant" in S. 2490 are undefined, and in the context of contemporary world politics and warfare, are inherently ambiguous. Litigation of their meaning in a medical malpractice case, of itself, would have a disruptive effect on military discipline. More importantly, such legislation is based on a fundamental lack of understanding of the totality of the commitment that members of the Armed Forces are called upon to make. The need for complete commitment, discipline, and unfailing loyalty are not diminished in so-called "peacetime."

Nevertheless, if the Congress concludes that some further monetary compensation, in addition to the existing system of automatic, no-fault military and veterans benefits, is necessary for service personnel injured by military medical malpractice, we believe that the appropriate remedy should be an amendment to the MCA. The MCA is a well-established, administrative remedy for the payment of claims for property damage, personal injury, or death caused by either civilian or military personnel of the Armed Forces acting within the scope of their employment. Currently, active-duty military personnel may not file MCA claims for military medical malpractice. Our proposal would amend the MCA to give servicemembers this remedy. I am convinced that an amendment to the MCA is a far more practical and less disruptive method for providing such compensation than the tort litigation "remedy" proposed by S. 2490 and H.R. 1054.

In our opinion, the MCA approach has many advantages over amending the FTCA:

o The Military Claims Act would protect military personnel regardless of where they are assigned. In amending the FTCA, S. 2490 and H.R. 1054 would cover only personnel in the United States. Considering that almost 500,000 U.S. troops are currently assigned in foreign countries, the devastating impact on military morale and discipline of denying approximately 25 percent of the Armed Forces a new benefit available to the other 75 percent can hardly be exaggerated.

o The MCA would not put courts in the untenable position of second-guessing military decisions. Nor would it disrupt military operations by making servicemembers subject to the orders, dockets, and schedules of civilian judges and lawyers.

o The MCA is efficient. Unlike S. 2490 and H.R. 1054, which would increase the burdens of an already saturated judicial system, the MCA approach would build upon an existing administrative system that can more readily accommodate the additional cases that would arise under the MCA amendment. S. 2490 and H.R. 1054 would require claimants to seek relief under the FTCA, which permits their lawyers to take fees of 20 percent of the award even if the claim is settled administratively and 25 percent if a case goes to court. The FTCA remedy would also result in litigation costs that the plaintiff--the injured soldier, sailor, airman or marine--must bear. The MCA amendment would avoid those costs and limit attorneys' fees to 10 percent of the award, ensuring that the injured party and not his or her lawyer receives the bulk of the compensation for that injury.

o The MCA provides an unbiased review of claims. Claims are evaluated by judge advocates who are independent of the medical personnel who provided the care in question. Where necessary, outside medical consultants in the appropriate specialty area also review the care. Appeals of claims over $100,000 are decided by the Service Secretary concerned or a civilian Presidential appointee in his or her office. Before taking the potentially disastrous step of inserting the courts into the military claims process, I urge you to enact the Department's Military Claims Act proposal and then evaluate the Department of Defense's performance under the proposed MCA approach.

o For over 30 years, the MCA has provided a vehicle for claimants overseas who are not Feres-barred to recover for malpractice. Thus, there is a system already in place that has a proven record for handling malpractice claims. It should be given the opportunity to work for the active-duty force as well, if additional compensation for malpractice injuries is to be provided.

The Military Claims Act provides an administrative remedy for the payment of claims for property damage, personal injury or death, caused by either civilian or military personnel of the Armed Forces acting within the scope of their employment, or otherwise resulting from the noncombat activities of the Military Departments.

In some instances, active-duty servicemembers now may recover for damages by filing an MCA claim (e.g., personal property damage). On the other hand, active-duty servicemembers currently may not seek administrative relief under the MCA for medical malpractice. Under regulations issued by the respective Service Secretaries, the Military Departments settle such claims when the claimed damages are established to have been proximately caused by the negligent or wrongful conduct of an employee. A claim, however, cannot be settled under this statute if it is cognizable under the FTCA. Active-duty military members injured incident to their service currently look to the no-fault compensation scheme provided through military and veterans' benefits.

While each Armed Force operates under procedures set out in its own regulations, meritorious claims cognizable under the MCA are generally processed by experienced claims judge advocates locally assigned to military installations and reporting directly to their respective claims division in Washington. Once a claim is filed, it is thoroughly investigated. Individual claimants, most of whom choose to be represented by privately retained counsel, are included in the investigative process and are encouraged to provide any relevant information to support their claim. Military investigators, in turn, share all information gathered with the claimant and his or her attorney in an informal atmosphere of cooperation. When the facts establish that an injury is attributable to governmental negligence, settlement negotiations begin. A final offer is ultimately presented to the claimant, who may accept it in full satisfaction for the claim or appeal it to a higher authority. A claimant may also administratively appeal the government's finding of no liability.

Appeals for claims of $100,000 or less are made to the Judge Advocate General of the respective military service. Appeals of claims greater than $100,000 are made to the respective Service Secretary. Decisions by appellate authorities are final but may be reconsidered based upon newly discovered evidence.

There is no limitation on the amount that may be claimed. The first $100,000 of any approved claim will be paid out of the appropriated funds of the service involved. Amounts above $100,000 are paid by the General Accounting Office out of the judgment fund.

Claims for personal injury or death include such elements of damage as pain and suffering; loss of time, earnings, and services; diminished earning capacity; permanent injury; physical disfigurement; anticipated medical expenses; death benefits; and, in general, all elements of damage recoverable in a suit at law. The claim may not, however, include medical, hospital, and burial expenses already paid by the United States.

As discussed, one of the MCA's major advantages is its worldwide applicability. Unlike the FTCA, which is not applicable outside the United States, the MCA contains no such restriction and has been used for over thirty years to pay claims arising out of incidents overseas. For example, claims by military dependents for medical malpractice occurring in military medical facilities in foreign countries are paid under the MCA. Our proposal would bring active duty military personnel under the same coverage. By using the MCA for this purpose, service members would be guranteed worldwide coverage for injuries resulting from the negligence of military health care personnel, provided such injuries do not result from treatment "furnished in a combat area, during an air, land, or sea maneuver or exercise, or in connection with the use of the Armed Forces in civil disasters or disturbances."

I would now like to discuss why the proposed legislation is ill-advised from the standpoint of national defense. To that end, I will address why retaining sovereign immunity with respect to tort lawsuits by military members is important to the United States, and point out the adverse effects that the passage of S. 2490 or H.R. 1054 would produce. Next, I will discuss why the legislation is unnecessary and why it will fail to accomplish the avowed goal of improving military medicine.

At the outset, I want to emphasize that all of us at the Department of Defense share Congress' concern for those who have suffered because of inappropriate medical treatment. Because of that concern, the Secretary of Defense, the Assistant Secretary of Defense for Health Affairs, the Surgeons General, the Judge Advocates General, the Inspectors General, and the audit agencies have all worked hard to improve the quality of military health care. I know of no one in the Department of Defense who is insensitive to the needs of military men and women. And I know of no one who is more sensitive to these needs than the Secretary of Defense. Our highest priority is to ensure that their morale and motivation to serve remain high. Unquestionably, one of the essential ingredients for maintaining a well-disciplined, motivated armed force is the understanding by servicemembers that they are being treated fairly in all respects, including receiving fair compensation for service-connected injuries. The key issue before us, however, is whether removing the Feres bar to medical malpractice cases would further the legitimate ends of discipline, morale, and fair compensation. I believe it would not.

THE FERES DOCTRINE IS CRUCIAL TO THE MAINTENANCE OF GOOD ORDER AND DISCIPLINE.

The Feres doctrine holds that servicemembers injured incident to service may not sue the United States. Because of the inherently disruptive nature of litigation, the concept of soldiers suing their government is alien to our traditional philosophy of military discipline and Anglo-Saxon jurisprudence. Thus, courts have recognized the unique nature of the military and its indispensable role in preserving the nation, and have been reluctant to intrude into the military environment. Good order and discipline are not merely "buzz words." Rather, they are dynamic values, vital to the effectiveness of our armed forces.

The Feres doctrine has been applied in deciding recent cases that have constitutional dimensions: Chappell v. Wallace, 462 U.S. 292 (1983); United States v. Shearer, 473 U.S. 52 (1985); United States v. Stanley, 107 S. Ct. 3054 (1987); and United States v. Johnson, 107 S. Ct. 2063 (1987). In each case, the Supreme Court barred suit. The essence of these decisions is that even when constitutional deprivations are alleged, the remedy must reflect the unique nature of military service. This does not mean military authorities may transgress individual rights with impunity. For aggrieved servicemembers, numerous forms of redress are available within the military structure, in addition to the right to communicate directly with the Congress or the President. Moreover, if the conduct complained of violates law or regulation, an array of administrative actions and criminal proceedings, such as courts-martial, are available to deal with transgressors. For military personnel who suffer physical injury or disability, Congress has created a comprehensive compensation scheme to provide benefits--both financial and medical--without regard to fault.

The Supreme Court has repeatedly recognized that the zone of interests peculiar to the military requires judicial protection. We urge Congress to continue this same approach.

Our greatest concern with the proposed bills is the prospect of members of the Armed Forces bringing suit against the government. Lawsuits have the great potential of disrupting discipline and military operations. As the United States Court of Appeals for the Ninth Circuit stated, "To determine the effect that a particular type of suit would have upon military discipline would be an exceedingly complex task . . . [N]early every case would have to be litigated and it is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs." Henninger v. United States, 473 F.2d 814, 815-816 (9th Cir. 1973) (emphasis added).

Several hypothetical cases illustrate the potential for misplaced attacks upon military decisions through the FTCA suits that would be authorized by S. 2490 and H.R. 1054. Consider the following:

a. A pilot is ordered removed from flight status because of a medical condition diagnosed by a flight surgeon. The pilot (whose career and therefore livelihood are in jeopardy), instead of following his orders, attempts to circumvent those orders through a malpractice suit alleging that the diagnosis was improper.

b. A commander denies a security clearance to a soldier based upon a mental health examination. The soldier brings suit alleging misdiagnosis and mental anguish as a result of the diagnosis.

These types of decisions are made daily in almost every command in the military. They are not always purely medical decisions. Frequently, non-medical decisions made by commanding officers are based on factors which may have as their basis a physical or mental health report. Subjecting these decisions to judicial scrutiny concerning their medical basis would have a severe negative impact on the discipline of the military personnel who would see medical personnel and commanders hailed into court to justify their decisions. This situation could foster the belief that no order is lawful and final until the courts have ruled that it is.

One further example will show how good order and discipline could be affected. Assume that S. 2490 and H.R. 1054, or similar legislation, is enacted. A servicemember in an overseas command is scheduled for surgery. He demands that it be performed in the United States (so he may sue if, in his judgment, the surgery is not successful). Does the commanding officer send this individual back? Does he medically discharge him? Does he allow the servicemember to make the decision or barter for the choice? Does he court-martial him for disobeying the order to go to the hospital? What is at issue here is the authority of the commanding officer; the knowledge that such authority was challenged takes no time at all to spread throughout the unit, and that is what serves to undermine the good order and discipline, as well as the cohesiveness, of the unit.

These examples serve to point out that the implications of forgoing sovereign immunity to permit malpractice suits by active-duty members go far beyond furnishing a money-damage remedy for physical injuries. Practically all military medical decisions in the United States and the administrative actions that flow from them would become fair game in FTCA suits under the proposed bill. Military personnel decisions would be seriously impaired, remaining in limbo for lengthy periods until judicially resolved.

Although the inevitable entangling of administrative personnel actions and medical malpractice suits is sufficient reason not to support S. 2490 and H.R. 1054, this legislation has other, equally serious disadvantages.

THE LOSS OF THE FERES DOCTRINE WOULD ADVERSELY AFFECT MORALE.

The proposed amendments to the FTCA and the Administration's MCA bill would both create a privileged class of claimants. We, therefore, continue to believe that the best solution is to examine the adequacy of benefits for all military members who are injured by negligence incident to duty, regardless of its source. If, however, Congress decides to legislate only for the victims of military medical malpractice, the MCA approach is vastly preferable to either S. 2490 or H.R. 1054. Unlike those bills, the MCA would cover virtually all military medical malpractice, not just malpractice that occurs in the United States or in domestic fixed medical treatment facilities.

One example illustrates this point. A surgeon in a military stateside hospital makes an error. As a result, servicemember A suffers paralysis. Under the proposed legislation, he could sue the United States. Servicemember B is walking on the sidewalk outside the hospital and is hit by a government vehicle driven negligently by a motor pool driver. Servicemember B is paralyzed as a result of his injuries. He may not sue, although he has virtually the same disability.

How does a commanding officer explain this distinction to the people he must lead? How does he justify it? Servicemembers understand they give up certain rights when they enter the service and they learn that they receive certain benefits. One of those benefits is a system that provides them sure and swift compensation if they are injured incident to their service, regardless of fault. Without question, that compensation should be adequate and fair. It should compensate servicemember B in the same manner as servicemember A. If that compensation is deemed inadequate, that is what ought to be corrected. Courts have often cited the simple, certain, and uniform compensation for injuries or death of those in the Armed Services. This uniformity would be destroyed by statutory exceptions carving out privileged areas of litigation, and with it will go the understanding that all are being treated fairly.

As a Task Force of the New York State Bar Association recently recognized, this would be patently unfair. Indeed, the Task Force's report characterized the prospect of barring one soldier who is injured in the battlefield from suing but permitting another to sue for malpractice as "abhorrent." Task Force report at 3.

THE PROPOSED LEGISLATION ERODES UNIFORMITY.

Opponents of the Feres doctrine do not recognize that one of the chief morale benefits of the existing compensation scheme, and of our Military Claims Act bill, is that comparable situations are treated uniformly. The principle is as basic as it is essential: In a military organization uniformity, consistency, and fairness are vital to the preservation of discipline, order, and cohesiveness. S. 2490 and H.R. 1054 threaten this principle and seek to replace it with special compensation based upon the circumstances and situs of injury.

H.R. 1054 applies only to those malpractice claims that occur in the United States; and S. 2490 applies to claims that occur "in a hospital or other medical facility of the Armed Forces" not in foreign countries. Neither would allow suits for other incidents. Thus, we face the possibility of one sailor being able to sue for injuries that occur in a naval hospital, while a sailor similarly injured only several miles away aboard an aircraft carrier will be denied comparable relief. Or a soldier injured by medical malpractice at Walter Reed Army Medical Center could sue, whereas another soldier in Europe or on board a medical evacuation flight overseas could not. If we recall our earlier example of the servicemember who refuses his consent to surgery unless it is performed back in the United States, it becomes obvious that disparate treatment of injuries based on the geographic location of an accident is as ill-advised as is disparate treatment based on how the injury occurred.

Because the FTCA bases liability on state law, a marine in California might recover, but another marine, subject to a different body of state law in North Carolina, might not. Both marines, however, would have one thing in common: their duty stations are the result of military orders, not their personal choice. Selective special compensation dependent upon fortuity of location falls short of the even-handed fairness we must exercise to preserve military morale.

We have not accepted the argument that medical malpractice is a unique type of negligence. S. 2490 and H.R. 1054 provide a remedy only for malpractice, but not for other forms of negligence. If a soldier loses a leg on field maneuvers, on the base in a driving accident, or in the hospital at the hands of a surgeon, he suffers the same injury. More importantly, this bill would significantly demean all injuries sustained in combat in identifying the tort remedy as ideal, and then denying it to servicemembers who fall in battle. To provide special compensation for the medical injury, while denying it for other equally painful and debilitating losses, will promote neither the appearance nor the reality of fairness.

We fully support a compensation system for all service-connected injuries that is equitable and reflects current economic conditions. Just as Congress has made the Federal Employees' Compensation Act and the Longshore and Harbor Workers' Compensation Act the exclusive remedies for injuries to covered personnel, we suggest Congress should maintain the existing, exclusive compensation system for all service-connected injuries, including those from military medical malpractice. This will have a far more positive impact on morale than creating a special class of litigants whose right to recover depends upon where and how they were injured and not on the injury they suffered.

In short, permitting tort lawsuits for medical malpractice injuries would have a negative effect upon the military mission, discipline, and morale. Moreover, the Department of Defense cannot discern a positive benefit to be derived from S. 2490, H.R. 1054 and similar bills--least of all for military health care.

In recognition of the persistent support by some in Congress for special treatment of injuries to military members resulting from medical malpractice, the Department of Defense has recommended that additional compensation for this type of injury be provided under the MCA. This, of course, does not overcome the problem of disparate treatment for one kind of injury, as described above.

PERMITTING MORE LAW SUITS WILL NOT IMPROVE MILITARY MEDICINE.

The proposed legislation is grounded partially upon a perception that military medicine is in a state of crisis and requires immediate action to remedy its shortcomings. Last Congress, for example, the House Judiciary Committee favorably reported a bill identical to H.R. 1054 with the observation that "this legislation should result in improved military medical care, because of the threat of suit." H. Rep. No. 288, 99th Cong., 1st Sess. 4 (1985). This proposition cannot withstand close analysis.

First, medical malpractice suits under the FTCA are permitted for the approximately 70 percent of the patient population served by military medical facilities who are military retirees and dependents of active-duty and retired personnel. It defies belief to assert that increasing the potential tort claim and litigation case load by the remaining 30 percent would achieve any beneficial effect upon the quality of health care. Any argument that military physicians provide better care to those who may sue for malpractice is a gratuitous insult to this dedicated group of officers who are bound by the same ethical requirements in treating all of their patients.

Next, we are all aware of the ongoing malpractice liability crisis in the civilian medical community. In several areas, notably southern Florida, the crisis has resulted in the denial of health care in some hospitals. Instead of opening new avenues for malpractice recovery, state legislatures are now passing tort reform measures designed to restrict the amount of recovery, to limit attorney's fees, and to allow consideration of collateral recoveries in computing judgments. The point is that, notwithstanding all the malpractice suits in the civilian sector, malpractice claims are still on the rise. In other words, if the number of malpractice actions reflects the incidence of malpractice, then the threat of suit does nothing to improve medical care.

Some supporters of the proposed legislation may contend that if a suit is filed, the negligent practitioner will correct his behavior to avoid paying another judgment and defending another case. This "deterrence" theory is misplaced for two reasons. First, the traditional purpose of tort law in our jurisprudence has been to compensate, to make whole. The punitive feature of tort law expressly was made inapplicable to the United States in the FTCA itself. Second, when malpractice claims are filed against military physicians, they are immunized from suit under 10 U.S.C. § 1089. This immunity is essential. Otherwise, we would be unable to recruit and retain physicians because of high malpractice insurance premiums. Since military physicians do not have to pay malpractice judgments out of their own pockets, the deterrent effect ascribed to permitting more lawsuits is nonexistent. The only apparent deterrence in the civilian sector, where physicians (or their insurers) are liable for malpractice judgments, is that physicians are discouraged from practicing in high-risk medical specialties such as obstetrics, and more and more insurers refuse to provide coverage for those who continue. No improvement in the quality of care is demonstrated.

The Department of Defense is not only dedicated to providing our personnel with the best health care possible, but has taken aggressive action to assure it. The watchwords of today are "quality assurance" and "provider accountability." Lawsuits are not needed, nor would they be effective to encourage us to do better. Indeed, the performance of military physicians is reviewed with greater frequency and more vigor, and against tighter standards, than in any health care system we know.

In short, we in the Department of Defense have not been deaf to the crtics of medical care in the Armed Services, nor do we have a callous disregard for those who have been injured. Instead, we submit, a litigious approach to eliminating medical malpractice misses the mark and will cause serious problems for military morale and discipline, thereby jeopardizing the ability of the Department of Defense to perform its mission.

CONCLUSION

To recapitulate:

- The notion of military personnel suing the United States in tort runs counter to the accumulated wisdom and experience of all three branches of government.

- Enacting S. 2490 or H.R. 1054, thereby creating the right to sue for malpractice, will open a Pandora's box of administrative, morale, and disciplinary problems in the Armed Services.

- Such a law would in fact threaten morale, as it would create a special class of litigants favored over all others.

- Medical care in the military services is not in a state of chaos and disrepair. The Congress should not topple the well-established proscription against tort suits by active-duty military personnel in an ill-conceived effort to correct a problem that does not exist.

- Tort lawsuits have never stopped or even diminished malpractice. Instead, the Department of Defense should be encouraged to press forward with aggressive quality assurance programs and with measures holding physicians accountable for their actions. These mechanisms are far more effective than a judgment paid by the Treasury, because our quality assurance and accountability programs benefit the entire patient population, not just those who win a lawsuit.

- A compensation scheme already exists that can fairly compensate all injured persons regardless of the cause of the negligence. If that compensation is inadequate, let's correct it.

- The proposed legislation would create inequities in geographical areas covered. Servicemembers overseas could not sue; their compatriots in the United States could.

The proposed legislation is an expression of concern for the plight of those who have suffered real injuries. But its premises are faulty. First, neither H.R. 1054 nor S. 2490 would reduce malpractice or improve morale. Only the Department of Defense can do that as we aggressively pursue improved health care. Second, the financial objective of these bills would be best advanced by a thorough review of our no-fault benefits system, which should provide adequate, realistic compensation for service-connected injuries on a uniform basis without regard to the fortuitous circumstances of individual claimants.

We recognize, however, that Congress may wish to focus its attention on the narrow issue of compensation for active-duty personnel who have been injured by military medical malpractice. Rather than eviscerate the Feres doctrine, which has well served the nation and its Armed Forces for thirty-eight years, we support the Administration's proposed amendment of the Military Claims Act. This bill would provide a fair, efficient, and proven administrative remedy to the active-duty victims of medical malpractice, just as it has to their dependents overseas for over thirty years. The Military Claims Act approach would satisfy the perceived need for additional compensation but not endanger the vitality of our Armed Forces. The Department of Defense therefore favors its enactment as far preferable to amendments to the FTCA.

RESPONSES OF MS. BUCK TO WRITTEN QUESTIONS SUBMITTED BY SENATOR HEFLIN

Question 1. Senator Heflin: Do either of you believe that the members of our armed forces are currently adequately compensated for injuries they sustain as a result of medical malpractice?

Ms. Buck: In September 1985, the Department of Defense completed a comprehensive study of the disability, death, and survivor benefits available to military members injured or killed incident to service. The study compared current military benefits to those provided by seven states (California, Texas, Tennessee, Kansas, Virginia, Massachusetts, and Florida). The study showed that the military compensation plan is roughly equivalent to civilian workers' compensation, but that there are some areas of disparity that may be in need of adjustment. For example, a young married soldier who is fifty percent disabled as a result of military service receives almost half the financial benefits of a similarly situated person collecting workers' compensation in Virginia, Florida, and Massachusetts, about the same as a person in Tennessee, and slightly more than a Kansan. As the injured servicemember moves up in grade and length of service, however, the military compensation system matches or exceeds those of all the states surveyed in the study.

Additional consideration of disability compensation and benefits is needed to pinpoint and correct inadequacies. Efforts in this area are just beginning, and the Department of Defense would welcome the opportunity to work with the Congress and the Veterans' Administration to improve benefit levels for all military personnel where warranted.

As part of this review of benefits, Congress may wish to consider providing supplemental compensation to military personnel who are injured because of negligence. In this regard, the Department of Defense and the Department of Justice have offered a legislative proposal that would enable active-duty military personnel to obtain compensation for medical malpractice administratively under the Military Claims Act, 10 U.S.C. § 2733.

Question 2. Senator Heflin: Are the Departments of Defense and Justice against any judicial review of claims by Armed Forces personnel concerning medical malpractice?

Ms. Buck: There are several reasons why the Department of Defense remains opposed to judicial review of medical malpractice claims of Armed Forces personnel. First, judicial review is unnecessary. The proven effectiveness of the Military Claims Act, which has been in operation for over 30 years without judicial review, leads the Department of Defense to conclude that military members who have been victims of military medical malpractice would be fairly compensated under this Act without imposing judicial review. Before inserting the courts into any aspect of an action involving a military member who has suffered malpractice, we urge Congress to enact the Administration's Military Claims Act proposal without any form of judicial review. This will enable Congress to evaluate the Department's performance before creating a judicial remedy that will endanger military morale, cohesiveness, and discipline. Second, as we have explained in response to your question below (see question 6), as well as in our response to Senator Grassley (see question 1), and our responses to Senator Thurmond (see questions 3 and 4), judicial review is undesirable. Civil litigation will undoubtedly disrupt the operational readiness of the Armed Forces since the civilian judicial process will necessitate military compliance with the dockets and schedules of civilian judges and lawyers. More importantly, judicial review will erode discipline and trust by undermining the military's traditional mission of "caring for its own," and leaving military members with the impression that the only way to obtain the remedy they seek is to "take the boss to court."

Question 3. Senator Heflin: Do you think that S. 2490 or H.R. 1054 could result in a litigation explosion involving members of the Armed Services and United States?

Ms. Buck: Yes, we expect a substantial increase either as a request for compensation for legitimate injuries or as a new method of making a grievance for incidents unrelated to medical care. This increase in workload will require a concomitant increase in staffing to adjudicate the claims and represent the government at any judicial review. For further discussion, see my answer to question 7 below.

Question 4. Senator Heflin: What do you see as the advantages of amending the Military Claims Act as opposed to passing H.R. 1054 or S. 2490?

Ms. Buck: I am convinced that an amendment to the Military Claims Act is a far more practical and less disruptive method for providing compensation to military members who have suffered from military medical malpractice than the tort litigation remedy proposed by S. 2490 and H.R. 1054. Specifically, the significant advantages of an amendment to the Military Claims Act include the following:

° The Military Claims Act would protect military personnel regardless of where they are assigned. In amending the FTCA, S. 2490 and H.R. 1054 would cover only personnel in the United States. Considering that almost 500,000 U.S. troops are currently assigned to foreign countries, the devastating impact on military morale and discipline of denying approximately 25 percent of the Armed Forces a new benefit available to the other 75 percent can hardly be exaggerated.

- The MCA would not put courts in the untenable position of second-guessing military decisions. Nor would it disrupt military operations by making servicemembers subject to the orders, dockets, and schedules of civilian judges and lawyers.

- The MCA is efficient. Unlike S. 2490 and H.R. 1054, which would increase the burdens of an already saturated judicial system, the MCA approach would build upon an existing administrative system that can more readily accommodate the additional cases that would arise under the MCA amendment. S. 2490 and H.R. 1054 would require claimants to seek relief under the FTCA, which permits their lawyers to take fees of 20 percent of the award even if the claim is settled administratively and 25 percent if a case goes to court. The FTCA remedy would also result in litigation costs that the plaintiff -- the injured soldier, sailor, airman or marine -- must bear. The MCA amendment would avoid those costs and limit attorneys' fees to 10 percent of the award, ensuring that the injured party and not his or her lawyer receives the bulk of the compensation for that injury.

- The MCA provides an unbiased review of claims. Claims are evaluated by judge advocates who are independent of the medical personnel who provided the care in question. Where necessary, outside medical consultants in the appropriate specialty area also review the care. Appeals of claims over $100,000 are decided by the Service Secretary concerned or a civilian Presidential appointee in his or her office.

- For over 30 years, the MCA has provided a vehicle for claimants overseas who are not Ferres-barred to recover for malpractice. Thus, there is a system already in place that has a proven record for handling malpractice claims. It should be given the opportunity to work for the active-duty forces as well, if additional compensation for malpractice injuries is to be provided.

Question 5. Senator Heflin: If we amend the Military Claims Act, what assurance would Armed Forces personnel have that they will be adequately compensated?

Ms. Buck: The philosophy of the services in administering the Military Claims Act is to compensate equitably based on the nature of the injuries. As with the Federal Tort Claims Act, almost all claimants are represented by an attorney to protect their interests, and claims are negotiated in good faith. But whether or not a claimant is represented by counsel, every benefit of the doubt is extended to the claimant in a Military Claims Act case.

This philosophy is illustrated by a comparison of recent Federal Tort Claims Act awards for medical malpractice versus medical malpractice payments awarded under the Military Claims Act. The Department of the Army, for example, made the following MCA payments for fiscal years 1985, 1986, and 1987 as compared to FTCA awards for the same years:

Medical Malpractice Claims MCA

FISCAL YEAR	NUMBER FILED	CLAIMS PAID	AMOUNT CLAIMED	AMOUNT PAID	AVERAGE PAYMENT
85	72	26	$531,607,901	$4,712,307	$181,242
86	79	20	217,048,028	1,499,697	74,984
87	80	19	245,090,831	6,863,130	361,217

Medical Malpractice Claims FTCA

FISCAL YEAR	NUMBER FILED	CLAIMS PAID	AMOUNT CLAIMED	AMOUNT PAID	AVERAGE PAYMENT
85	377	100	$1,019,000,748	$20,563,435	$205,634
86	376	86	745,153,143	7,986,649	92,869
87	308	85	1,103,558,814	11,550,517	135,888

As you can see, MCA payments were not only comparable to FTCA awards in 1985 and 1986, but almost tripled FTCA awards in 1987. Air Force and Navy payment comparisons closely parallel the experience of the Army. The Military Claims Act has well served the Armed Forces for over thirty-eight years. We are confident the MCA would similarly provide a fair and efficient remedy to the active-duty victims of medical malpractice.

Question 6. Senator Heflin: Why do you believe that H.R. 1054 or S. 2490 will have an adverse effect on military discipline or efficiency?

Ms. Buck: Discipline in the Armed Forces is based on treating all military personnel in a uniform and consistent manner. H.R. 1054 and S. 2490 will single out victims of medical malpractice for favored treatment. This in turn will affect discipline and morale as servicemembers whose injuries are not the result of medical malpractice, receive less compensation. A servicemember injured in the line of duty should not receive less than someone injured in a medical treatment facility. Nor should commanders be confronted with the dilemma of explaining why life or limb lost in combat or during a training exercise is worth less than life or limb lost through medical malpractice. Discipline can only be adversely affected by such a program. It cannot be enhanced.

The argument that allowing suits for medical malpractice will improve the quality of military medicine is also without support. Since 1982 all three military departments, with the encouragement and direction of the Department of Defense, have aggressively promoted programs of quality assurance and physician accountability. Today, these programs are some of the best in the country. It is noteworthy that civilian physicians have been the subject of medical malpractice suits for decades, but such exposure has not, in and of itself, improved the quality of care. To the contrary, malpractice suits have increased exponentially, leading to an insurance crisis and the enactment of numerous tort reform initiatives. Quite simply, H.R. 1054 and S. 2490 cannot be expected to improve the quality of military medical care. And if the real purpose behind these proposals is to ensure adequate compensation to military members who have suffered military medical malpractice, they fail because they ignore the 500,000 plus members assigned overseas. Only the Administration's proposed amendment to the Military Claims Act provides a fair compensation scheme for all active-duty military members.

Question 7. Senator Heflin: Have any cost estimates been done on either of the two bills before us today?

Ms. Buck: In late 1985, the Congressional Budget Office (CBO) estimated that passage of similar legislation would result in additional claims payments of $25 million. That figure was arrived at in the following manner: Approximately $50 million in malpractice claims was paid by the military in 1984. Those payments were made to civilians eligible for medical care in military facilities, i.e., dependents and retirees. Those civilians represented two-thirds of the patient population serviced by military hospitals; the other one-third was military personnel barred by Feres from filing malpractice claims. By applying a straight line extrapolation, the CBO figured that military patients, if allowed to file claims, would generate 50% more in payouts or $25 million.

Based upon FTCA payouts over the past three years and using the same methodology employed by the CBO, DoD estimates that passage of the proposed legislation will cost approximately $30.5 million per year.

Both the CBO and DoD calculations are extremely speculative in that it is impossible to actuarially anticipate what kind of injuries may be sustained by malpractice victims. Moreover, one catastrophic injury may result in a multimillion dollar recovery which skews the statistical base upon which such calculations are made.

Neither of the estimates above factors in the transaction costs associated with processing thousands of additional FTCA claims that military personnel would be expected to file. The Army alone estimates that this legislation would generate at least 262 additional claims each year based on current civilian claims rates. That figure is probably low since the cost of filing a claim is negligible. Because servicemembers automatically begin collecting no-fault compensation for service connected injuries, the risk associated with filing an FTCA claim is also negligible. It is conceivable that many dissatisfied military patients will routinely file claims on the theory that there is nothing to lose and everything to gain. Experienced Army claims personnel estimate that active-duty FTCA claims will initially be more than 1,000 per year requiring an additional 64 claims personnel to handle them in a timely manner. A similar number of Navy and Air Force claims can also be expected. Additional Justice Department assets will also be required to handle the increased litigation generated by these legislative proposals.

Question 8. Senator Heflin: It is my understanding that the Secretary of Defense recently ordered the establishment of the Department of Defense Medical and Dental Review Board to review the health care of active-duty military personnel. What has become of this Board?

Ms. Buck: On July 21, 1987 the Department of Defense published a proposed rule concerning the Board in the Federal Register for public notice and comment. See 52 Fed. Reg. 27421. The proposed rule contained policies and procedures to govern the operation of the Board. Under the proposed rule, at least one member of the Board would have to be a physician, with the other members selected from other disciplines that are pertinent to the Board's mission. None of the Board's members would be a full-time employee of the Department or on active duty in a uniformed service. The Department contemplated asking leading members of the medical, legal, and other professions to serve on the Board. This necessarily would entail great personal sacrifices on their parts.

The Department was concerned to obtain the broadest range of comments on the proposed rule, in order to refine it and to gauge the extent of support for the Board. To supplement the rulemaking notice in the Federal Register, on August 5, 1987, the then-General Counsel of the Department sent letters seeking comments on the proposed rule from the Chairmen of the Senate and House Committees on Armed Services, the Chairmen of the Senate and House Committees on the Judiciary, the Chairman of the Senate Committee on Rules and Administration, the Chairman of the Senate Subcommittee on Manpower and Personnel, the Chairwoman of the House Subcommittee on Military Personnel and Compensation, the Chairman of the House Subcommittee on Administrative Law and Governmental Relations, and the Comptroller General of the United States. No comments were received, either in response to the rulemaking notice or these letters.

While the Department was considering the proposed rule, the House of Representatives was taking action on H.R. 1054, which would amend the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq., to permit active-duty military personnel to sue the United States for medical malpractice. The bill was passed by the House. A similar bill,

S. 347 (renumbered S. 2490) is pending before this Subcommittee. During this period, representatives of the Department of Defense prepared, as a drafting service, legislation that would authorize administrative claims for medical malpractice by active-duty members under the Military Claims Act, 10 U.S.C. § 2733. This draft bill subsequently received clearance from the Office of Management and Budget, and the Departments of Justice and Defense presented it to the Congress as a formal legislative proposal.

In light of the distinct possibility that Congress would enact legislation, such as an amendment to the Military Claims Act or the Federal Tort Claims Act, that would render the Board superfluous, and the lack of demonstrated public or Congressional interest in activating the Board, the Department has decided to defer issuance of a final rule. We will revisit this matter if Congress expresses its preference for the Board over the legislation now before it.

RESPONSES OF MS. BUCK TO WRITTEN QUESTIONS SUBMITTED BY SENATOR GRASSLEY

Question 1. Senator Grassley: I'd like to focus on the "military discipline" rationale for maintaining the Feres doctrine. Isn't it true that if the military's negligence causes injury to a civilian (rather than an active-duty serviceman), there is the same chance that a trial could involve second-guessing military orders and require armed forces members to testify as to each other's actions?

Yet there would be no basis, either in Feres or the Federal Tort Claims Act for barring the civilian's suit on this ground. What's the difference, from the "discipline" point of view?

Ms. Buck: Discipline, morale, and unit cohesion are the hallmarks of an effective fighting force. Everything a commander does is designed to inculcate these values into his or her organization. In our opinion, these values will be seriously undermined if a select group of servicemembers is allowed to sue the United States for compensation beyond that already authorized under the current no-fault system. These values are not implicated when a civilian sues the United States even though civilian suits may require servicemembers to appear at trial, submit to depositions, and at times testify as to each other's conduct.

One of the chief morale benefits of the existing statutory compensation scheme is the uniform manner in which all are treated. The principle is as basic as it is essential: in a military organization, uniformity and fairness are vital to preservation of discipline, morale, and cohesion. The proposed legislation threatens this principle and seeks to replace it with special compensation based upon the circumstances and situs of an injury. Only those servicemembers injured as a result of medical malpractice occurring within fixed medical facilities within the United States would be afforded the opportunity to seek additional compensation. Disparities will inevitably arise. For example, one sailor would be able to sue for injuries received at a naval hospital; another, similarly injured a few miles away aboard an aircraft carrier, would not. A soldier injured by medical malpractice at Walter Reed could sue, whereas another similarly injured in Europe, could not. Both soldiers, however, would have two things in common: their injuries and the fact that their geographic duty stations were the result of military orders, not personal choice. Such selective special compensation, dependent on the fortuity of location will, in our opinion, have a devastating impact on military morale and therefore on combat effectiveness.

Of even greater concern is the fact that only claims based on medical malpractice will have access to this new remedy. Thus, a soldier who loses a leg on field maneuvers or in the motor pool will be treated differently than one who loses a leg in a military hospital at the hands of a surgeon, although all three suffered the same injury as a result of someone else's negligence. How does a commanding officer explain this distinction to the people he must lead? How does he justify it? How does he deal with the natural resentment that such unfair treatment will engender within his organization? These are morale and discipline problems that do not arise when a civilian sues the United States. They are, however, very real problems for the commander who must sustain a cohesive unit of motivated soldiers willing to endure the dangers and privations of military service.

Military morale and discipline are also affected by the special relationship of a soldier to his comrades-in-arms. Permitting one soldier to sue another for the negligent performance of his duty is anathema to the teamwork, mutual trust, and discipline upon which our military system operates. We categorically reject the argument that military health care providers are somehow different from all other servicemembers in this respect. Military doctors, nurses, and corpsmen are an essential part of our fighting forces. They play a critical role in maintaining the combat readiness of our force and are justly proud of their long history of service during both war and peace. This legislation would single them out for special treatment by allowing a fellow soldier to attack a medic's duty performance in a civilian court thus circumventing the chain of command. The large number of anticipated malpractice suits brought by those seeking additional compensation will surely drive a wedge soldiers, sailors, airmen, and marines they are charged to support. It is our position that this can only lead to a significant erosion of morale, cohesion, and discipline throughout the force.

The impact of litigation on the "specialized community" of our fighting forces will have another invidious affect. It will undermine trust not only among individual servicemembers, but also between soldiers and their organization. To allow soldiers to sue the government for damages, even if limited to medical malpractice, implies that the military has failed in its traditional mission of "caring for its own" and that only by taking the "boss" to court can fair treatment be achieved. Fostering that attitude within a community which demands uncompromising trust and teamwork has dire implications for our national defense.

A final distinguishing feature between military and civilian plaintiffs and the respective effects of their FTCA suits on military discipline pertains to the impact that such suits may have on military operations. Civilian plaintiffs sue under the FTCA to secure damages for alleged injuries. Some servicemembers, on the other hand, may be inclined to pursue such actions with ulterior motives in mind.

Military health care practitioners often make determinations upon which commanders rely. The resulting decisions of the commanders frequently are contrary to the personal desires of the member and may have an adverse economic impact on him, e.g., the physical disqualification of a pilot from flying status. To allow disgruntled servicemembers to challenge their superiors by attacking the medical basis for those decisions would surely "involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." It is our strongly held belief that such litigation can be expected if the proposed legislation is passed, and that the mischievous use of the law by some will create an environment in which commanders may be reluctant to act upon medical advice for fear of generating disruptive civil litigation.

Question 2. Senator Grassley: The Administration has consistently testified that they fear any legislative chipping away at Feres will lead to complete judicial abrogation of the doctrine. After all, since this is a judicially-created doctrine to begin with, a court may simply say . . . . "negligence is negligence." What effect do you think this bill could have on other Feres-type (but non-medical malpractice) cases, if it were enacted?

Ms. Buck: The Feres Doctrine is a judicially created exception to the Federal Tort Claims Act

(FTCA) based upon the Supreme Court's interpretation of Congress' legislative intent in enacting the FTCA. As such, any amendment to that long standing doctrine could be interpreted by some as a Congressional rejection of the doctrine's original underpinnings. Attacks on the doctrine's applicability to numerous non-medical malpractice activities could be expected, e.g., accidents which occur during training, in the motor pool, on the flight deck of an aircraft carrier, or while using government provided recreational facilities.

Question 3. Senator Grassley: Since military doctors and officials are already immune from being sued personally (under the Gonzales Act) for medical malpractice, how will either of these bills make them or the hospital administrators more accountable or more careful?

Ms. Buck: Neither of these bills can be expected to have an effect on the quality of military medicine. Good health care is produced by selective recruitment, thorough training, diligent peer review and proper allocation of adequate resources. Military medicine has a wide range of meaningful sanctions which can be taken against careless or substandard providers. These include: suspension, limitation or revocation of facility privileges; administrative discharge from the service for failure to exhibit or maintain professional proficiency; notification to state and professional regulatory bodies of poor performance; administrative disciplinary actions such as censure and reprimand; and, in the extreme, criminal charges and sanctions pursuant to the Uniform Code of Military Justice.

RESPONSES OF MS. BUCK TO WRITTEN QUESTIONS SUBMITTED BY SENATOR THURMOND

Question 1. Senator Thurmond: This question is for you Ms. Buck. Do you have any suggestions or alternatives to this legislation which would compensate victims in these cases and improve the quality of medical care in our military?

Ms. Buck: If Congress concludes that some further monetary compensation, in addition to the existing system of automatic, no-fault military and veterans benefits, is necessary for service personnel injured by military medical malpractice, we believe the appropriate remedy is enactment of the Administration's proposed amendment of the Military Claims Act (MCA). Our proposal would authorize active-duty military personnel to file administrative claims for the alleged malpractice of Department of Defense health care providers.

For over 30 years, the Military Claims Act has provided a vehicle for claimants overseas who are not Feres-barred to recover for malpractice. Thus, there is a system already in place that has a proven record for handling malpractice claims. While each Armed Force operates under procedures set out in its own regulations, meritorious claims cognizable under the MCA are generally processed by experienced claims judge advocates locally assigned to military installations and reporting directly to their respective claims division in Washington. Once a claim is filed, it is thoroughly investigated. Individual claimants, most of whom choose to be represented by privately retained counsel, are included in the investigative process and are encouraged to provide any relevant information to support their claim. Military investigators, in turn, share all information gathered with the claimant and his or her attorney in an informal atmosphere of cooperation. When the facts establish that an injury is attributable to governmental negligence, settlement negotiations begin. A final offer is ultimately presented to the claimant, who may accept it in full satisfaction for the claim or appeal to a higher authority. A claimant may also administratively appeal the government's finding of no liability.

Appeals for claims of $100,000 or less are made to the Judge Advocate General of the respective military service. Appeals of claims greater than $100,000 are made to the respective Service Secretary. Decisions by appellate authorities are final but may be reconsidered based upon newly discovered evidence.

There is no limitation on the amount that may be claimed. The first $100,000 of any approved claim will be paid out of the appropriated funds of the service involved. Amounts above $100,000 are paid by the General Accounting Office out of the judgment fund.

Claims for personal injury or death include such elements of damage as pain and suffering; loss of time, earnings, and services; diminished earning capacity; permanent injury; physical disfigurement; anticipated medical expenses; death benefits; and, in general, all elements of damage recoverable in a suit at law. The claim may not, however, include medical, hospital, and burial expenses already paid by the United States.

I have outlined the significant advantages of the Military Claims Act approach over S. 2490 and H.R. 1054 above (see response to question # 4 from Senator Heflin). In terms of how the proposed Military Claims Act amendment might improve the quality of medical care in the military, I must reiterate that none of the proposals being discussed can be expected to have an effect on the quality of military medicine. Military health care providers are immune from being sued personally for medical malpractice (under the Gonzales Act). None of the proposals make these individuals any more accountable than they are today. My views, however, on how we can continue to monitor and improve the quality of military medical care are reflected in my answers to your questions, (see responses to questions 2 and 5) and in my response to Senator Grassley (see response to question 3).

Question 2. Senator Thurmond: Ms. Buck, it is my understanding that under the proposed legislation, individual doctors will not be personally liable. Will this legislation do anything to make doctors more accountable for their actions and to bring more professionalism to military medical treatment?

Ms. Buck: No. The vehicles to ensure adequate individual accountability already exist in the military medical system and they are being used frequently and, I believe, effectively. The Gonzales Act was passed in 1976 because Congress recognized that added financial inducements were needed to attract qualified, competent health care providers. Recognizing that individual malpractice insurance was a significant expense for most providers, the statute provided a low-cost, high-yield benefit to military health care professionals. The need to attract quality people is as great today as it was then. A provider who is "insured" by the federal government will be no less careful than a provider insured by a commercial institution. The realities of the situation are the same. Someone else will bear the judgment. Professional, peer review generated sanctions, are more likely to be effective in controlling substandard medicine than will be the transparent threat of individual liability.

Question 3. Senator Thurmond. Ms. Buck, it appears that this bill, if enacted, may decrease morale and discipline by treating servicemembers with the same injuries differently. For example, a soldier who loses a hand due to malpractice would get substantially more compensation than a soldier who lost his hand in combat. Could you briefly respond to this issue?

Ms. Buck: The issue of non-uniform treatment of servicemembers injured in the line of duty, whether that duty involves combat, training, or submission to medical care, remains DoD's most serious objection to S. 2490 and H.R. 1054.

Assuming the soldiers in the hypothetical are of similar rank, both would receive the same no-fault compensation provided under current law. The soldier injured in the hospital, however, would be allowed under the proposed legislation to seek additional damages under the Federal Tort Claims Act (FTCA). We feel this inequity will indeed create severe morale problems within the armed forces once it becomes known that soldiers who sustain similar injuries can receive vastly different compensation depending on where they are injured and by whom.

One need not contrast combat and noncombat injuries, however, to identify significant inequities that will arise under this legislation. Since the FTCA applies only within the United States, over 500,000 soldiers, sailors, airmen and marines stationed overseas will be effectively denied this additional compensation remedy. Moreover, servicemembers who sustain medical malpractice injuries outside "fixed medical facilities" within the United States will also be denied recovery. For example, a soldier injured at Walter Reed will be able to sue, but one injured in an ambulance on the way to Walter Reed will not, even though the negligence that caused their injuries is identical. Finally, servicemembers injured in noncombat accidents such as those occurring in a motor pool, on a flight deck, or during maneuvers will also be denied the opportunity to seek increased compensation in federal court.

Question 4. Senator Thurmond: Ms. Buck, is it possible that S. 2940 could disrupt day to day military operations by requiring the military to make personnel available for pre-trial and trial purposes at times and locations set by non-military attorneys and judges?

Ms. Buck: Yes. This legislation, if enacted, would undoubtedly cause a significant increase in the number of actions filed under the Federal Tort Claims Act. This, in turn, will result in a greater diversion of military health care providers to efforts of defending these additional cases. The end result is that fewer provider care hours will be available to military health care beneficiaries and will further strain available personnel resources. Additionally, H.R. 1054 and S. 2490 would almost certainly disrupt military operations by making servicemembers (other than military medical personnel) subject to the orders, dockets, and schedules of civilian judges and lawyers.

Question 5. Senator Thurmond: Ms. Buck, could you describe the process and procedures by which doctors are disciplined for rendering treatment that falls below current medical standards?

Ms. Buck: The military services have a broad range of regulatory and statutory authority to deal with poor medical officers. At the lower end of the spectrum are administrative sanctions such as formal counseling and letters of caution. Hospital privileges may be affected in more serious cases so that a physician has his or her clinical privileges limited, suspended or revoked. When interns or residents are involved, their training programs can be altered, extended or terminated, depending upon the extent of the problem. Where performance suggests retaining the physician in the military is not appropriate, discharge proceedings may be initiated. If the physician leaves the service with less than full clinical privileges, appropriate state and professional regulatory bodies are notified. In the most extreme circumstances, formal disciplinary actions and criminal sanctions are available under the Uniform Code of Military Justice.

STATEMENT OF BRENT O. HATCH

Mr. HATCH. Thank you, Mr. Chairman. It's an honor to be here, Chairman Heflin and Senator Thurmond, to represent the Department of Justice. My extended testimony has been provided to the committee and I ask that it be entered into the record.

Senator HEFLIN. Without objection, it is so ordered.

Mr. HATCH. Thank you.

It is an honor to be here today to present the views of the Department of Justice on S. 2490 and H.R. 1054. These bills, as we have heard, create a limited exception to the *Feres* doctrine by allowing active duty service members to bring civil actions, under the Federal Tort Claims Act, against the United States for injuries resulting from malpractice occurring in facilities operated by the United States.

It is the view of the Department of Justice that such a limitation on the longstanding *Feres* doctrine would be unwise and, therefore, the Department opposes these bills. I appreciate the testimony of my honorable colleague, Ms. Buck, who has given you an outstanding overview of the *Feres* doctrine and the Department of Defense bill that has been proposed as an alternative.

It is our position that the *Feres* doctrine continues to have vitality and that the Department has consistently argued against any attempt to emasculate that doctrine. As I understand it, the driving force behind the bills that are in consideration here is a perceived inadequacy in the current military compensation scheme in medical malpractice cases. We have heard today quite a bit of testimony with the theme that our military personnel should be treated as first-class citizens.

It is the position of the Department of Justice that first-class treatment is indeed what has been given. We are not placed, by not allowing these people to sue under the Federal Tort Claims Act, in a position where these people receive no compensation or are without remedies. These people indeed do have compensation under the systems that are presently set forth—free medical; sick and convalescent care; leave with full pay; complete psychiatric and psychological treatment, where it is necessary; complete patient hospital care, including disability payments and retirement systems, where that is necessary.

It is our position—and I understand it is the Department of Defense's as well—that such a perception that these people are being left without any compensation is clearly mistaken. Private claimants must go uncompensated until they navigate the arduous path of civil litigation, often with no guarantees of success. Injured military claimants are eligible for and assured benefits immediately and, under the plan of the Department of Defense, would receive additional opportunities to proceed under the Military Claims Act.

The issue here is really one in which the Court of Appeals for the Ninth Circuit, in a case called *Bailey* v. *Van Buskirk*, stated,

> The military service does not leave those permanently injured in the line of duty uncompensated. Congress has attended to such things in a reasonably adequate way. All we deny today is to plaintiff-appellant is a remedy he likes better.

Under the proposed bill, the injured service member must go through an over-burdened and slow civil litigation system. This system is an extremely inefficient way of providing compensation. In addition to the years it can take to receive benefits, those benefits can vary widely depending on the locale of the incident which creates additional inequities.

Most troubling to the Department of Justice and part of our testimony in several tort reform measures that have been in front of the Congress over the past several years, is the troubling high transaction cost of that system. Many studies over the years have shown that injured plaintiffs are often receiving far less than half of the money put into that system. What that means is that considerable money is going to lawyers and to the court system and less of the money is actually going to the injured person.

As we understand the bill put forward by the Department of Defense to allow remedies under the Military Claims Act, we believe adequate remedies are being provided and that bill would provide, as Ms. Buck has put forward, a very efficient means of providing compensation, maintaining morale and discipline, and giving effect to the other arguments that are the basis of the entire *Feres* doctrine.

So, it is our position that the Department of Defense bill would be a far preferable alternative and that the *Feres* doctrine should not be emasculated by the bills presently before this committee.

The only other comment I have is that we have talked considerably here about better care, better medical doctors, and better attendant care to our military people. These bills do not address better care. They merely provide an opportunity to sue. We believe that the military doctors are certainly first rate—and the military is making great effort to provide the finest care to its service members. These bills create no economic benefit or motivation to provide better care because these bills make the U.S. Government liable, not the doctors.

It's our opinion that the Department of Defense bill is preferable and I welcome any questions from the committee. Thank you.

[The statement of Mr. Hatch, along with responses to written questions, follows:]

STATEMENT

OF

BRENT O. HATCH
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE

THE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
OF THE SENATE
COMMITTEE ON THE JUDICIARY

CONCERNING

S. 2[illegible]90 and H.R. 1054

ON

JUNE 17, 1988

I am pleased to appear before the Subcommittee today to present the views of the Department of Justice on S. 2490 and H.R. 1054, bills which would allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care.

In general, both S. 2490 and H.R. 1054 would permit claims against the United States under the Federal Tort Claims Act for the personal injury or death of a member of the Armed Forces serving on active duty when the claim arises out of medical or dental care furnished in medical facilities operated by the United States. If enacted, these proposals would essentially overrule a sound, long-standing, and viable rule of law known as the *Feres* doctrine for certain military medical malpractice claims. The Department of Justice opposes these bills, and urges that they not be enacted. If the Congress, nevertheless, concludes that some further monetary compensation in addition to already available benefits is necessary for service members injured by medical malpractice, then the Department of Justice recommends that an appropriate remedy be predicated upon the Military Claims Act, 10 U.S.C. § 2733 (MCA). The Department recently provided the Judiciary Committee with such a proposal.

I will first address the *Feres* doctrine, then S. 2490 and H.R. 1054, and conclude by addressing the amendment to the MCA proposed by the Department of Defense.

The Feres Doctrine

Since these bills so directly impact upon the *Feres* doctrine, a brief explanation of the doctrine and its underpinnings is in order. The doctrine derives its name from the case of Feres v. United States, 340 U.S. 135, which was decided by the Supreme Court in 1950. In Feres and its progeny, the Court has held that members of the uniformed services cannot sue the federal government, other service members, or civilian government employees in tort for injuries which arise out of, or are incurred in, the course of activity incident to military service. The Court relied upon three principal reasons in coming to its decision:

(1) The existence and availability of a separate, uniform, comprehensive, no-fault compensation scheme for injured military personnel;

(2) The effect upon military order, discipline, and effectiveness if service members were permitted to sue the government or each other; and,

(3) The distinctly federal relationship between the government and members of its armed services, and the corresponding unfairness of permitting service-connected claims to be determined by nonuniform local law.

It is important to understand where the Feres doctrine fits into the body of law that governs tort suits involving the United States. To start with, the United States, as sovereign, is immune from suit unless it has consented to be sued, United States v. Sherwood, 312 U.S. 584 (1941). Further, the United

States may define the terms and conditions upon which it may be sued. Soriano v. United States, 352 U.S. 270 (1957). The Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671, et seq.), constitutes a waiver of sovereign immunity, with certain specific limitations. United States v. Sherwood, supra; Carr v. Veterans Administration, 522 F.2d 1355 (5th Cir. 1975); Childers v. United States, 442 F.2d 1299 (5th Cir.), cert. denied, 404 U.S. 857 (1971); Simon v. United States, 244 F.2d 703 (5th Cir. 1957).

With Feres and its two companion cases, Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), and Griggs v. United States, 178 F.2d 1 (10th Cir. 1949), the Supreme Court was called upon to determine whether the Federal Tort Claims Act was intended to waive that aspect of sovereign immunity which concerned the relationship between soldiers and their government. The common fact underlying each case was that the injured person was a service member on active duty, who sustained injury due to the action or inaction of others in the Armed Forces. I specifically note that two of the cases concerned allegations of medical malpractice. Reflecting upon the body of law from which the Federal Tort Claims Act carved a limited exception, the Supreme Court stated:

> We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving.

340 U.S. at 141, and concluded:

> . . . that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.

Id. at 146.

The holding of Feres has been broadly and persuasively applied by the courts and has now stood for 38 years without either legislative or judicial alteration. It is even stronger today as a result of the reaffirmation of its rationale by the Supreme Court in United States v. Johnson, --- U.S. ---, 107 S. Ct. 2063 (1987), and the Court's decisions in United States v. Stanley, --- U.S. ---, 107 S. Ct. 3054 (1987), United States v. Shearer, 473 U.S. 52 (1985); Chappell v. Wallace, 462 U.S. 296 (1983); and Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, reh'g denied, 434 U.S. 882 (1977). See also Atkinson v. United States, 825 F.2d 202 (9th Cir. 1987), cert. denied, --- U.S. ---, 108 S. Ct. 1288 (1988). These cases recognize that the policy underpinnings of the Feres doctrine are as valid today as they were in 1950.

The first of the three reasons or policy factors underlying the Feres doctrine is the availability of a viable alternative to damage suits in the form of a comprehensive statutory compensatory scheme. In Feres, the Supreme Court stressed that the Federal Tort Claims Act "should be construed to fit . . . into the entire statutory system of remedies against the government [and thereby create] a workable, consistent and equitable whole," 340 U.S. at 139, and that it was thus highly relevant that

Congress had already provided, "systems of simple, certain, and uniform compensation for the injuries or death of those in the Armed Services." 340 U.S. at 144.

The present statutory compensation scheme has three discrete components. First, members of the uniformed services serving on active duty receive free medical care when injured or ill. See, e.g., 10 U.S.C. §§ 3721, 6201, and 8721. They also receive unlimited sick leave with full pay and allowances until well or released from active duty. Survivors of service members are entitled to death gratuity benefits which include six months of base pay (10 U.S.C. §§ 1475-1482), as well as unique, subsidized insurance or insurance-type plans. 10 U.S.C. §§ 1447, et seq.; 38 U.S.C. §§ 765, et seq.

Second, Congress has established a comprehensive disability retirement system for service members permanently injured in the line of duty. See 10 U.S.C. §§ 1201 and 1401. Moreover, should a service member leave the service without seeking disability retirement, he may later request it. For example, section 1552 of Title 10, United States Code, provides that the Secretary of the Army, acting through the Army Board for the Correction of Military Records (ABCMR), may correct any military record when he considers it necessary to correct an error or remove an injustice. This authority has often been used to provide former service members who demonstrate that they suffer from a permanent disability as a result of a service-related injury, with a retroactive, permanent disability retirement annuity and even back pay. See 32 C.F.R. § 581.3(b)(2) (1987); Sec. 4, A.R. 15-185.

Third, the Veterans Benefits Act provides yet another system of medical care, disability and death benefits for the service-disabled veteran and his family.[1] (A veteran eligible for both veterans disability benefits and military disability retirement benefits must choose which he will receive.)

The Supreme Court in _Feres_ and the lower federal courts through the years have emphasized that the benefits available under the statutory system developed by Congress were not only adequate and comprehensive, but also compared extremely favorably with those provided by most workers' compensation statutes. _Zoula v. United States_, 217 F.2d 81, 84 (5th Cir. 1955). In 1977, the Supreme Court reaffirmed this consideration in the _Stencel_ case, _supra_, by stating:

> A compensation scheme such as the Veterans' Benefits Act serves a dual purpose: it not only provides a swift, efficient remedy for the injured serviceman, but it

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[1] 38 U.S.C. §§ 301-362: Compensation for Service-Connected Disability or Death.

38 U.S.C. §§ 501-562: Pension for Non-Service Connected Disability or Death or for Service.

38 U.S.C. §§ 401-423: Dependency and Indemnity Compensation for Service-Connected Deaths.

38 U.S.C. §§ 601-654: Hospital, Nursing Home, or Domiciliary Care and Medical Treatment.

38 U.S.C. §§ 701-788: National Service Life Insurance.

> also clothes the Government in the "protective mantle of the Act's limitation-of-liability provisions." [Citation omitted.] Given the broad exposure of the Government, and the great variability in the potentially applicable tort law, see Feres, 340 U.S., at 142-143, the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries.

431 U.S. at 673. The compensation scheme even prompted one court to comment as follows:

> The military service does not leave those permanently injured in the line of duty uncompensated. Congress has attended to such things in a reasonably adequate way. All we deny plaintiff-appellant is a remedy he likes better.

Bailey v. Van Buskirk, 345 F.2d 298 (9th Cir. 1965), cert. denied, 383 U.S. 948 (1966).[2]

The second consideration that has led to the broad application of the Feres doctrine by the courts through the years can be understood as an aspect of the traditional reluctance of American courts to intervene in military affairs, and the reluctance of the Congress to force such intervention. In United States v. Brown, 348 U.S. 110, 112 (1954), the Court said:

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[2] In addition to compensation for personal injury, it is worthy to note that the American service member has a plethora of other remedies available to seek equitable and criminal relief for grievances. For example, see:

10 U.S.C. §§ 938: Complaints of Wrongs;

10 U.S.C. §§ 801, et seq.: Uniform Code of Military Justice;

United States Navy Regulations, ¶ 1107, Interview with Commanding Officer (Request Mast);

United States Navy Regulations, ¶ 1106, Redress of Wrong Committed by a Superior.

> The peculiar and special relationship of the soldier to his superiors, the effects of maintenance of such suits on discipline and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court [in Feres] to read the Act as excluding claims of that character. [Citation omitted.]

Simply put, Feres' prohibition of intramilitary tort litigation derives from society's most elemental instinct: self-preservation through a strong military.

This consideration comes into play even where the issue is not military discipline in the strict sense. United States v. Lee, supra. What, in reality, is sought to be avoided is the general judicial intrusion into the area of military performance. See Mattos v. United States, 412 F.2d 793 (9th Cir. 1969); Callaway v. Garber, 289 F.2d 171 (9th Cir.), cert. denied, 368 U.S. 874 (1961). In Henninger v. United States, 473 F.2d 814 (9th Cir.), cert. denied, 414 U.S. 819 (1973), a medical malpractice case of relevance to the instant proposals, the plaintiff had elective surgery prior to being released from the service. He argued that since the operation was performed after he had been processed for discharge, permitting him to sue for injuries incurred during its course could not have the undesirable consequences feared by the Supreme Court. The appeals court rejected this argument, stating:

> To determine the effect that a particular type of suit would have upon military discipline would be an exceedingly complex task, as Henninger concedes. The proximity of the injury to discharge would be only one factor. Whether it resulted from an allegedly negligent order would be another. Whether it was caused by totally unrelated military personnel would be yet a third. In short, nearly every case would have to be litigated and *it is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs* . . . . This is a classic situation where the drawing of a clear line is more important than being able to justify, in every conceivable case, the exact point at which it is drawn. This is especially so because servicemen injured incident to their service are entitled to Veterans' benefits. [Italics added.]

Id. at 815-816 (citations and footnotes omitted). See Del Rio v. United States, 833 F.2d 282 (1987) (plaintiff's allegation of negligent prenatal care barred by Feres; medical malpractice cases would require courts to second guess military physicians' decisions and could impair essential military discipline, given plaintiff's position as a Navy hospital corpsman). See also Bailey v. Van Buskirk, supra; Camassar v. United States, 400 F. Supp. 894 (D. Conn. 1975), aff'd, 531 F.2d 1149 (2d Cir. 1976); Knoch v. United States, 316 F.2d 532 (9th Cir. 1963).

S. 2490 and H.R. 1054 would substantially blur the "clear line" that currently exists under the law. They would create an exception to a principle that now applies to virtually all facets of active duty, including recreation, Hass v. United States, 518 F.2d 1138 (4th Cir. 1975), off-hours secondary employment on a military base, Miller v. United States, 643 F.2d 481 (8th Cir.

1981) (en banc), and the activities of reservists, United States v. Carroll, 369 F.2d 618 (8th Cir. 1966). The disparity in treatment that these proposals would create between service members injured by malpractice in stateside medical facilities, and those injured by the negligence of their fellow service members anywhere else in the world, would open the door to total evisceration of the Feres doctrine just a bit further. A plethora of bills seeking additional exceptions to the doctrine would undoubtedly follow. Moreover, the courts might view enactment of either of these bills as an invitation to judicial assault, with potentially the same result. In the end, the applicability of the Feres doctrine, even to combat situations, may well be cast into doubt.

The third policy consideration, the federal nature of the relationship and the absence of analogous private liability, led the Supreme Court in Feres to conclude that a service member's suit failed to state a claim under the Federal Tort Claims Act language which provides, "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674. On this point, the Supreme Court, in Feres stated:

> Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from

> established law in the absence of express congressional command.

340 U.S. at 146.

An analogy to various state workers' compensation statutes which preclude suit by covered workers injured in the course of employment also comes to mind. United States v. Lee, 400 F.2d 558 (9th Cir. 1968), cert. denied, 393 U.S. 1053 (1969). The Supreme Court in Feres recognized the relationship existing between the United States and its military personnel as one "distinctively federal in character," and that application of local law to that relationship by virtue of the Federal Tort Claims Act would be inappropriate. 340 U.S. at 143. 28 U.S.C. § 1346(b). See Atkinson v. United States, supra (availability of alternative compensation scheme and the distinctly federal nature of relationship between U.S. and members of its Armed Forces supports application of doctrine to this case). The fact that the location of the injury should determine the law to be applied "makes no sense and is unfair to the soldier who has no choice as to his location, particularly because of wide variances in local law." United States v. United Services Automobile Association, 238 F.2d 364, 366 (8th Cir. 1956). This is particularly so for the individual soldier who is a prospective defendant in a tort case, as well as for the United States itself.

While it sometimes is argued that the Feres doctrine is unfair to service members who are the victims of medical malpractice, as we have seen, the Feres doctrine is an adjunct to a compensation package available to service members which, on the whole, is far more generous, even-handed, and fair than compensation available to private citizens. This is because service members, unlike their civilian counterparts who suffer serious adverse consequences from medical care, generally are eligible for compensation whether or not those consequences are the result of substandard medical care. While, in certain cases, the compensation may be somewhat less than what might be available to a successful plaintiff who endures a medical malpractice lawsuit (just as workers' compensation systems generally provide lower benefits for work-related injuries than what may be available through tort litigation), the fact is that all of these service members are eligible for such compensation rather than only a small handful who in fact can show a causal link between their condition and substandard medical care. The arbitrariness and uncertainty associated with tort litigation is eliminated. Accordingly, from the perspective of all service members who suffer adverse consequences from medical care, the existing system of compensation is in many ways superior to what they would receive if they were private citizens.

Veterans' disability payments are also, in one important respect, more precisely compensatory for lost income than are lump-sum awards of tort damages. Monthly payments to veterans rise or fall in response to actual changes in levels of disability and continue throughout their lifetimes while disability persists. In this way, recompense more accurately tracks actual disability than do lump-sum awards which are necessarily based upon estimates of longevity and future disablement.

In any event, enactment of either of these bills would not, on balance, provide a better remedy for service members whose medical outcomes are disappointing. Under the present statutory compensation scheme, if the result of a medical procedure is for any reason unfavorable, a service member is entitled to continued care and benefits. He does not have to endure a lengthy court battle and demonstrate that his condition is due to the negligence of his doctor. Under the tort law system, however, an injured service member would be required to initiate a lawsuit and prove to a jury that his condition was proximately caused by medical malpractice before becoming entitled to collect a single dime in compensation.

It is absolutely essential to bear in mind that, under either of these bills, a service member is not guaranteed to recover anything by way of compensation; his "remedy" is purely speculative. Standing between injured service members with the right to initiate a lawsuit, and adequate compensation for their needs, is the problem-plagued American tort law system. To participate in it, these individuals will have to bear, as best they can, the transaction costs associated with modern lawsuits, prying, and often humiliating depositions and discovery, and years of waiting for an available trial date. Only then will they be in a position to endure the trauma of a jury trial in which, to secure any recovery at all, they must meet their burden of proof, overcome a host of technical defenses, successfully deal with issues concerning their degree of "fault", and convince a jury that a certain amount of money will "make them whole." Naturally, any awards that they actually recover will be offset by attorneys' fees. Such are the vicissitudes of the present tort law system.

The Department believes that the policy considerations outlined above are as valid today as when first articulated. Indeed, with suits against the government and individual federal officers increasing in numbers every year, the rationale for the Feres doctrine is even more compelling today.

Negative Impact of the Proposed Legislation

Accordingly, when S. 2490 and H.R. 1054 are examined in light of the three policy considerations upon which the Feres doctrine is based, the shortcomings of this legislation, as well as the problems which it will create, come disturbingly into focus.

Disruption of Military Units

One of the chief morale benefits of the existing statutory compensation scheme is that comparable situations are treated uniformly. The principle is as basic as it is essential: in a military organization, uniformity, consistency, and fairness are vital to the preservation of discipline, order, and cohesiveness. The proposed legislation threatens this principle and seeks to replace it with special compensation based upon the circumstances and situs of injury.

S. 2490 and H.R. 1054 apply only to those malpractice claims that occur in federal medical treatment facilities located in the United States. They would not allow suits for incidents that occur outside those facilities. Inevitably, disparities will arise. One sailor would be able to sue for injuries received at a naval hospital; another, similarly injured a few miles away aboard an aircraft carrier, would not. A soldier injured by medical malpractice at the Walter Reed Army Medical Center could sue, whereas another similarly injured in Europe, or on board a medical evacuation flight landing at Andrews Air Force Base, could not. Because the FTCA predicates liability on state law, a Marine in California might recover; but another, subject to a different body of state law in North Carolina, might not. Both Marines, however, would have one thing in common: their geographic duty stations are the result of military orders -- not their personal choice. Selective special compensation dependent upon the fortuity of location falls far short of the even-handed fairness required to preserve military morale.

Of even greater concern is the fact that only claims based on malpractice will have access to this new remedy. Thus, under either proposal, a soldier who loses a leg on field maneuvers or on the base in a driving accident will be treated differently than one who loses a leg in a military hospital at the hands of a surgeon, although all three suffered the same injury as a result of someone else's negligence. More importantly, these bills could be read to significantly demean *all* injuries sustained in combat by providing the soldier injured on the battlefield with administrative compensation, while the soldier injured in a military hospital seeks a million-dollar damage award in federal court.

Disruptive Impact of Litigation

Military morale and discipline are also affected by the special relationship of a soldier to his superiors and his comrades-in-arms. American courts have acknowledged the unique nature of this relationship in their reluctance to intervene in military affairs. Permitting one soldier to sue another for the negligent performance of his duty is anathema to the teamwork, mutual trust, and discipline upon which our military system operates. Superimposing the adversarial process of civil litigation onto the Armed Forces, even in the limited area of medical malpractice, will have a disruptive influence on military operations. The litigative process itself assures that result: military plaintiffs and witnesses will be summoned to attend depositions and trials, and they will have to take time from their regularly assigned duties to confer with counsel and investigators. They may even have to be recalled from distant posts. Such disruptions are opposite to the interest of our national defense, which demands that soldiers, sailors, airmen, and Marines be ready to perform their duties at all times.

The impact of litigation on the "specialized community" of our fighting forces will have another invidious effect. It will undermine trust not only among individual service members, but also between soldiers and their organization. To allow soldiers to sue their government for damages, even if limited to medical malpractice, implies that the military has failed its own and that only by taking the "boss" to court can justice be attained. Fostering that attitude within a community which demands uncompromising trust and teamwork has dire implications for our national defense.

Negative Influence on General Military Activities

The implications of retrenching on the Feres doctrine go far beyond providing tort remedies for injuries. Military health care practitioners often make determinations upon which commanders rely. The resulting decisions of the commanders frequently are contrary to the personal desires of the member and may have an adverse economic impact on him, e.g., the physical disqualification of a pilot from flying status. To allow disgruntled service members to challenge their superiors by attacking the medical bases of those decisions would surely "involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." United States v. Shearer, 473 U.S. 52, 59 (1985).

The Services already have procedures in place by which erroneous medical judgments can be challenged, examined, and corrected. Allowing malpractice suits by military personnel would exact an intolerable price for the use of medical information in making personnel decisions. Such litigation would create an environment in which a commander could not act without looking over his shoulder for the process server.

Accordingly, it is the view of the Department of Justice that the Feres doctrine is a sound and necessary rule of immunity which permits the Armed Services to be free to go about their mission of defending the country. At the same time, the remedies available as an alternative to lawsuits, which we have previously outlined, provide a means for meaningful redress and compensating those who are injured in the course of military service.

Military Claims Act Alternative

Nevertheless, should Congress conclude that some further monetary compensation in addition to available benefits is necessary for service personnel injured by military medical malpractice, the Department recommends that an appropriate remedy should be premised on the Military Claims Act. As we pointed out in our June 6 letter to the Chairman, the MCA amendment proposed jointly by the Department of Defense and Department of Justice is a far more reasonable method for providing such compensation than the tort litigation "remedy" proposed by S. 2490 and H.R. 1054.

Briefly stated, the proposed amendment to the MCA would apply worldwide, whereas S. 2490 and H.R. 1054 would both apply only to malpractice occurring in the United States. The MCA is less disruptive to military operations, in that military members are not subjected to the orders, dockets, and schedules of civilian judges and lawyers. The MCA facilitates prompt settlement of meritorious cases, using informal and less costly discovery procedures. It also operates efficiently and fairly in paying meritorious claims, and neutralizes the disparity among forums which results from differences in recovery potential from state to state. This is especially significant in that military personnel are subject to frequent transfer. Moreover, there are claims offices already in place with the proper training and support structures to investigate and process claims.

As we indicated in our correspondence, congressional concern for the quality of medical care provided to members of the Armed Forces should center on personnel and resources needed to assure the availability of the highest quality of care -- not on allowing courts to second-guess military decisions. While S. 2490 and H.R. 1054 would create serious problems for the relationship of members of the Armed Services to their military departments, the proposed amendment to the MCA does not engender such concerns. Consequently, the Department would not object to substitute legislation premised upon the MCA, such as the one it proposed along with the Department of Defense.

Conclusion

Accordingly, it is the view of the Department of Justice that the Feres doctrine continues to be a sound and necessary limit on the FTCA's waiver of sovereign immunity, essential to the accomplishment of the military's mission. At the same time, the alternative remedies available to service members provide for meaningful redress and compensation to those who are injured in the course of military service. Any additional relief should take the form of an amendment to the Military Claims Act which provides for the submission of claims predicated upon military medical malpractice.

RESPONSES OF MR. HATCH TO WRITTEN QUESTIONS SUBMITTED BY SENATOR HEFLIN

1. Do either one of you believe that the members of our armed forces are currently adequately compensated for injuries they sustained as a result of medical malpractice?

Yes. Members of the uniformed services serving on active duty receive free medical care when injured or ill. They also receive unlimited sick leave with full pay and allowances until well or released from active duty. Further, the survivors of service members are entitled to death gratuity benefits which include, among other things, six months of base pay, as well as a unique, subsidized insurance or insurance type of plan.

Additionally, Congress has established a comprehensive disability retirement system for those service members permanently injured in the line of duty. The Veteran's Benefit Act provides yet another complete system of medical care, disability and death benefits for the service-disabled veteran and his family.

Under the present system of compensation, if the result of a medical procedure is for any reason unfavorable, a service member is entitled to the continued care and benefits outlined above. Benefits vest immediately, and the service member does not have to endure a lengthy court battle and demonstrate that his condition is due to the negligence of his doctor. Under S. 2490 or H.R. 1054, however, an injured service member would be required to initiate a lawsuit and prove that his condition was proximately caused by medical malpractice before becoming entitled to receive any additional compensation.

The Supreme Court in Feres and the lower federal courts through the years, have had occasion to examine the current statutory compensation scheme. In their opinions, the courts have emphasized that the benefits available thereunder are not only adequate and comprehensive, but also compare extremely favorably with those provided by most workers' compensation statutes. See e.g., Bailey v. Van Buskirk, 345 F.2d 298 (9th Cir. 1965), cert. denied, 383 U.S. 948 (1966); Zoula v. United States, 217 F.2d 81, 84 (5th Cir. 1955).

2. Are the Departments of Defense and Justice against any judicial review of claims by Armed Forces personnel concerning medical malpractice?

The Department of Justice remains opposed to judicial review of medical malpractice claims submitted by active duty service members for several reasons. First, judicial review of the claims process is unnecessary. As demonstrated in our response to question number 5, service members who may be injured by medical malpractice will receive fair and adequate compensation under the MCA as it is presently administered by the Armed Services. Second, superimposing the civil litigation process onto the Armed Forces will have a disruptive influence on military operations; military members will be subjected to the orders, dockets, and schedules, of civilian judges and attorneys at the expense of mission readiness. Further, the judicial review process would place the injured service member and the military at opposite ends of an adversarial process in civilian courts. Moreover, discipline and morale will be sacrificed as military members come to believe that an adequate remedy can be obtained only by aggressively challenging their superiors in a civilian tribunal.

3. Do you think that S. 2490 or H.R. 1054 could result in a litigation explosion involving members of the Armed Services and the United States?

Please see our response to question #7, infra.

4. What do you see as the advantages of amending the Military Claims Act as opposed to passing H.R. 1054 or S. 2490?

There are several advantages to the proposed amendment to the Military Claims Act (MCA). Briefly stated, the MCA would apply world-wide, whereas S. 2490 and H.R. 1054 would apply only to incidents of malpractice occurring in the United States. The MCA is less disruptive to military operations, in that military members are not subjected to the orders, dockets and schedules of civilian judges and attorneys. The MCA facilitates prompt settlement of meritorious cases, using informal and less costly discovery procedures. It also operates efficiently and fairly in paying meritorious claims, and neutralizes the disparity among forums resulting from differences in state law. This is especially significant since military personnel are subject to frequent transfer. Moreover, under the MCA, there are claims offices already in place with the proper training and support structure to investigate and process claims quickly, efficiently and fairly.

Congressional concern for the quality of medical care provided to members of the Armed Forces should center upon acquiring the personnel and resources needed to assure the availability of the highest quality health care available, not on allowing civilian courts to second guess military decisions. S.2490 and H.R. 1054 would create serious problems for the relationship of members of the Armed Forces to their military departments. The proposed amendment to the MCA would not engender such concerns, however, it would accomplish the common purpose underlying S. 2490 and H.R. 1054 -- that is, providing a sound mechanism for awarding additional compensation to service members injured by medical malpractice.

5. If we amend the Military Claims Act, what assurance would Armed Forces personnel have that they will be adequately compensated?

The comparison chart provided below graphically represents the United States Army's response to medical malpractice claims filed under the Military Claims Act (MCA) between 1985 and the present, and the United States' response to similar claims filed under the FTCA during the same period. In two of the three represented years, more MCA claims were paid than were FTCA claims. In the last represented year (1987), MCA claimants received larger average awards than did FTCA claimants. Thus far, the average 1988 payment under the MCA exceeds the average 1987 FTCA payment by more than $13,000.

The Army's proven track record in the area of medical malpractice claims is a sound basis from which to conclude that service members who may be injured by medical malpractice are currently receiving adequate compensation under the MCA as administered by the Armed Services.

COMPARISON OF MEDICAL MALPRACTICE CLAIMS AND RECOVERIES UNDER THE FTCA AND THE MCA*

1985-1987

FTCA:

Year	Claims Filed	Claims Paid	Payment Factor	Average Payment
1985	322	100	31.1%	$205,634
1986	376	86	22.9%	92,868
1987	308	85	27.6%	135,888
MCA:				
1985	72	26	36.1%	181,242
1986	79	20	25.3%	74,984
1987	80	19	23.8%	361,217
1988-(May)	388	83	21.4%	149,500

Additionally:

Total MCA payments, 1987 - present

1985	$4.7 million
1986	1.5 million
1987	6.8 million
1988 (May)	3.3 million

* Compiled by U.S. Army Claims Service.

6. Why do you believe that H.R. 1054 or S. 2490 will have an adverse effect on military discipline or efficiency?

Superimposing the adversarial process of civil litigation onto the Armed Forces, even in the limited area of medical malpractice, will have a disruptive influence upon military operations. The litigative process itself assures that result: military plaintiffs and witnesses will be summoned to attend depositions and trials, and they will have to take time from their regularly assigned duties to confer with counsel and investigators. They may even have to be recalled from distant posts. Such disruptions are in conflict with the interests of national defense, which demands that soldiers, sailors, airmen, and Marines be ready to perform their duties at all times. Further, these bills would provide disgruntled service members with a vehicle to force their superiors into court, delay unwanted transfers, and to otherwise bring questionable lawsuits.

Additionally, both S. 2490 and H.R. 1054 would place the injured service member and the military at opposite sides of an adversarial process in civilian courts. Military commanders frequently make decisions which are grounded upon medical diagnoses. Both bills would permit service members to challenge military decisions by attacking their medical underpinnings. By allowing disgruntled service members to challenge the medical bases upon which their superiors' decisions are based, these bills will surely "involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." United States v. Shearer, 473 U.S. 52, 59 (1985).

Moreover, uniformity, consistency, and equality of treatment are vital to the preservation of discipline and mission-readiness. Only a motivated and disciplined fighting force can effectively serve our national defense. The Armed Forces insure uniform, consistent, and equal treatment of all members (and thus guarantee a motivated and effective fighting force) by treating individual soldiers with the same injuries in the same manner, no matter where or how they were injured. The proposals under consideration would undermine collective morale and discipline by treating similarly injured individuals in a different manner depending on where and how they were injured. Disparity among service members both in the manner of treatment as well as the recovery (if any) is certain to occur if S. 2490 and H.R. 1054 are passed.

7. Have any cost estimates been done on either of the two bills before us today?

Each year during the 1985-1987 period, the Civil Division received an average of 378 new medical malpractice cases involving the Departments of the Army, Navy, and Air Force. These Departments and the Department of Defense have each estimated that they will experience a 30 to 33 percent increase in the number of cases filed by heretofore Feres barred claimants if the proposed legislation is enacted. It has been estimated, therefore, that enactment of either of these bills would result in the addition of approximately 125 medical malpractice cases per year to the caseload of the United States Attorneys' offices. Current litigation expenses for existing medical malpractice cases average approximately $6,800 per case, including expenditures for medical texts, transcripts, and payments to expert witnesses. Estimated attorney time spent on these cases is approximately two months per case costing $11,780.00 in attorneys' salaries and benefits, and $3,870.00 in clerical salaries and benefits. To address the impact of the proposed legislation, the United States Attorneys' offices would be required to expend 21 attorney work-years, and 10 clerical work-years, for a total of $2,806,000.00 per year in litigation expenses including salaries.

The Civil Division would retain a small portion (two to three percent) of the new cases received each year. A one-third increase in the total new cases received would require the Department to allocate two additional attorneys and approximately 1 1/2 additional support personnel. The annual cost of this additional staff, including salaries, benefits, overhead and litigation-related expenditures would be approximately $195,000.00.

These estimates, of course, do not take into account the additional burden and cost that would have to be born by our already overloaded federal court system.

RESPONSES OF MR. HATCH TO WRITTEN QUESTIONS SUBMITTED BY SENATOR THURMOND

1. Mr. Hatch, in your prepared statement, you discuss the impact this legislation would have upon the Feres Doctrine. Please elaborate upon these effects and discuss whether this legislation would send a signal to the Supreme Court that Congress approves of further erosion of the Feres Doctrine?

In light of Justice Powell's majority opinion in the recent case of United States v. Johnson, 107 S. Ct. 2063, (1987), the Department believes that enactment of either of these bills would be perceived as a clear indication that Congress approves of further erosion of the long-standing Feres doctrine. Specifically, in Johnson, Justice Powell qualified his reaffirmation of the Feres doctrine and its rationale by first noting that the Court's continued adherence to it has paralleled Congress' unwillingness to "change[] [the] standard in the close to 40 years since [the Court] articulated [it], even though... Congress possesses a ready remedy [to do so]." [citation omitted] Id. at 2066.

Additionally, the proposed legislation would have a negative impact upon the important policy objectives of the Feres Doctrine. From the standpoint of military preparedness and national economic concerns, a retreat from the Feres Doctrine represents an unwise approach to the issue of adequate compensation for service members injured due to military medical malpractice.

2. The proposed legislation, Mr. Hatch, would amend the Federal Tort Claims Act to allow suits by servicemen. Since the Act requires federal courts to apply state law, would this lead to inconsistent judgments? Can you suggest any alternative means by which servicemen could be uniformly compensated?

Both S. 2490 and H.R. 1054 would inevitably give rise to inconsistent judgments and disparate results. First, both proposals apply only to malpractice claims that occur in federal medical treatment facilities located in the United States. They would not allow suits for incidents that occur outside those facilities. Thus, a soldier injured by medical malpractice at Walter Reed Army Medical Center could sue, whereas another similarly injured in Europe, or on board a medical evacuation flight landing at Andrews Air Force Base, could not. Second, because the FTCA predicates liability on state law, a service member in one state where a certain tort theory is acceptable might recover; but another, subject to a different body of state law might not. Both, however, have one thing in common: their geographic duty stations are the result of military orders -- not personal choice. Selective special compensation dependant upon the fortuity of location falls far short of the even-handed fairness required to preserve military morale.

As for alternative compensation schemes, it remains the position of the Department of Justice that present compensation for injured military personnel is comprehensive and adequate. If Congress feels additional compensation is necessary, then the Department of Defense's proposed amendment to the Military Claims Act (MCA) should be considered. Briefly stated, the proposed amendment to the MCA would apply worldwide, whereas S. 2490 and H.R. 1054 would both apply only to malpractice occurring in the United States. The MCA is less disruptive to military operations, in that military members are not subjected to the orders, dockets, and schedules of civilian judges and lawyers. It facilitates prompt settlement of meritorious cases, using informal and less costly discovery procedures. It also operates efficiently and fairly in paying meritorious claims, and neutralizes the disparity in recovery potential among forums. This is especially significant in that military personnel are subject to frequent transfer. Moreover, there are claims offices already in place with the proper training and support structure to investigate and process claims. Under the MCA, more of the taxpayers' money goes directly to the injured party, since attorneys' fees and other expenses are lower than if the matter was resolved judicially. Further, advance payment of an amount not in excess of $10,000 may be made before the submission of a claim where such payment is needed to help defray immediate expenses. Such advance payments are not permitted under the FTCA. For these reasons, the Department of Justice supports the Department of Defense's proposed amendment to the Military Claims Act.

3. Mr. Hatch, what would be the impact on the already overburdened federal court system of allowing claims for military medical malpractice to be brought under the Federal Tort Claims Act? Do you anticipate additional resources being required to defend these claims?

Passage of either of these bills would have a significant impact upon the federal court system. Each year during the 1985-1987 period, the Civil Division received an average of 378 new medical malpractice cases involving the Departments of the Army, Navy, and Air Force. It has been estimated that enactment of H.R. 1054 or S. 2490 would result in the addition of approximately 125 medical malpractice cases per year to the caseload of the United States Attorneys' offices. Most assuredly, the federal courts would need additional resources to handle this increase.

In addition to the burden on the federal court system, even greater resources would be required to defend these additional claims. Current litigation expenses for existing medical malpractice cases average approximately $6,800 per case, including expenditures for medical texts, transcripts, and payments to expert witnesses. Estimated attorney time spent on these cases is approximately two months per case costing $11,780.00 in attorneys' salaries and benefits, and $3,870.00 in clerical salaries and benefits. To address the impact of the proposed legislation, the United States Attorneys' offices would be required to expend 21 attorney work-years, and 10 clerical work-years, for a total of $2,806.000.00 per year in litigation expenses including salaries.

The Civil Division would retain a small portion (two to three percent) of the new cases received each year. A one-third increase in the total new cases received would require the Department to allocate two additional attorneys and approximately 1 1/2 additional support personnel. The annual cost of this additional staff, including salaries, benefits, overhead and litigation related expenditures would be approximately $195,000.00.

4. Mr. Hatch, if legislation such as S. 2490 were enacted, do you have any facts or figures you could provide for us detailing the potential costs that would be borne by the federal government?

The Department is unaware of any cost estimates other than those provided in our answer to the preceding question.

Senator HEFLIN. Thank you. Senator Thurmond, do you have any questions?

Senator THURMOND. Thank you, Mr. Chairman. Ms. Buck you can answer or the General can answer, either one. Do you have any suggestions or alternatives to this legislation, which would compensate victims in these cases and improve the quality of medical care in our military?

Ms. BUCK. Yes, sir; as I had indicated in my testimony——

Senator THURMOND. I can't hear you. You'll have to speak louder.

Ms. BUCK. As I had indicated in my testimony, we have put forth an alternative approach in terms of amending the Military Claims Act. But I would also suggest that one of the things that we could do here would be to look at the current compensation system. I think that it depends upon the objectives that you are looking at in this situation.

If you're addressing whether we need to provide additional compensation to people who are injured as a result of medical malpractice, there are various ways to look at providing a solution to that problem. If you're addressing accountability, then I think you're really looking at the quality assurance program that we have in the Department. One of the methods that we could certainly consider to solve any problems would be to look at the current compensation schemes that we have set up to help people who are injured.

Senator HEFLIN. Go ahead. Had you finished?

Ms. BUCK. Yes, sir.

Senator HEFLIN. We have a number of questions that Senator Thurmond would like to ask and I would like to ask and we'll submit them to you in writing and we would appreciate a prompt response to them.

Our next witness is Ms. Peggy Friend.

Ms. BUCK. Thank you very much.

Senator HEFLIN. By the way, before you go, do you want to tell us anything about the ongoing investigation at the Department of Defense on procurement or anything else like that? Do you have anything that you want to inform us about?

Ms. BUCK. Maybe the Department of Justice should. Certainly to say that we intend to fully cooperate with the Department of Justice in seeing that the investigation is carried out. Second, I believe that our public affairs office announced that we would also be establishing a task force to look at our current procurement system to determine first, whether the laws that currently exist are sufficient to cover the problems here and second, whether there are any vulnerabilities in our procurement system that we might like to change.

Senator HEFLIN. Would you say that Senator Warner's characterization—you wouldn't think that what I heard is accurate as to the depth and the sensational approach to all of this? Did you hear his characterization of it?

Ms. BUCK. I'm not sure that I know exactly how he characterized it.

Senator **Heflin**. Well, supposedly, he was whispering to Senator Nunn and he characterized it—you couldn't think of what I've just heard—which would indicate that it was quite serious.

Well, anyway, I'm just teasing you.

Ms. **Buck**. I would just hope that we wouldn't draw any specific conclusions right now until we see how the investigation proceeds and I would have to defer to the Department of Justice in terms of the scope of the investigation.

Senator **Heflin**. All right. Thank you. Ms. Friend, Ms. Peggy Friend, if you will, your prepared statement will be submitted for the record in its entirety and if you would, summarize to us, in 5 minutes, your testimony.

STATEMENT OF PEGGY D. FRIEND, RICHMOND, VA

Mrs. **Friend**. Mr. Chairman and Members of the subcommittee, good morning. My name is Peggy Drewery Friend, mother of Seaman James B. Friend III who died on March 26, 1986, at Balboa Naval Hospital, San Diego, CA. James was my first born and my only son and it is in his memory and on behalf of all military families who have suffered from medical malpractice and administrative negligence that I am speaking today.

While I am aware that the legislation surrounding the *Feres* doctrine will not affect my family or other families who have suffered in the past, it is my hope that my efforts, as well as the efforts of CAMI, will prevent further tragedies and injustices to military families and their survivors.

It was the last day, indeed the last few feet until basic training would be over for Company 18 at the Recruit Training Center at San Diego. Twenty-five-year-old James, eagerly awaiting graduation where he would receive a commendation for being the most outstanding recruit in his company, was engaging in those last few feet of the "freedom run" when he started falling behind.

His shipmates noticed this and encouraged him to continue since this was quite unusual for James. But James, sweating profusely and out of breath, could not continue. He collapsed, got up to continue, collapsed again. On the third try, he did not get up.

According to eyewitness accounts, his training officers prodded him to continue, one even calling him a demeaning name. He complained of being weak-kneed and said that he had asthma. An ambulance answering another call was waved on because a training officer thought James to be only winded. When it was realized that his condition was more serious, an ambulance was called. Between the time of his collapse, approximately 9:10 a.m., and his admission to ICU at Balboa Naval Hospital, approximately 5 hours and 20 minutes had passed.

Within that time, he had been placed in an ice bath to lower his 103.3 temperature, which cooled his body to a subtemperature reading of 92.8 and a potentially fatal one. My son had suffered a severe heat injury and rhabdomyolysis—muscle death. Complicating his condition even more was the fact that he carried the sickle cell trait, a genetically inherited condition that causes the red blood cells to sickle, thus depriving the muscles and vital organs of oxygen.

This condition can and did initiate multiple organ destruction. On the morning of March 26, 1986, 7 days after he entered the hospital, my son died. Ironically, he was wearing a red medical tag indicating that he carried the sickle cell trait. When his temperature was dropped to 92.8, this threw him into hypothermia. One vital organ after another deteriorated, renal failure occurred, as did disseminated intravascular coagulation, or DIC, a serious, often fatal condition which does not allow the blood to coagulate.

Finally, he contacted a nosocomial infection, which is a hospital-contacted infection, that invaded his entire body. This led to acute bacterial endocarditis. Because any heat injury is a medical emergency and immediate body cool-down is of vital importance, had there been someone on site who could recognize a serious heat injury, as opposed to just being winded and/or what the red medical tag he wore meant in relation to a serious heat injury, my son's problems would not have escalated as they did. He lay on the ground too long without medical attention. I do feel that my son's death began at the recruit training level.

I began this investigation on April 11, 1986, by seeking the help of Congressman Tom Bliley and Senator John Warner. Through the inquiries of Congressman Bliley and Senator Warner and my request through the Freedom of Information Act, I received my son's medical records 5 months after his death and a JAG investigation report 11 months after his death.

JAG findings clearly conclude that mistakes at the training level and in the hospital were made and that those mistakes led significantly to my son's death. Upon my arrival at Balboa, I was told emphatically, "Your son is not going to die." This is what happened.

My son developed acute exertional rhabdomyolysis following 1 hour of calisthenics and the freedom run and progressed to renal failure. He demonstrated the classical findings associated with this disorder, with serum enzymes rising sharply to extraordinary levels. Muscles became swollen, stiff and painful.

After his collapse on March 19, he was taken first to Naval Training Clinic, where he was dipped in an ice bath to lower his body temperature. This ice bath method can be potentially hazardous to one with the sickle cell trait. The misdiagnosis of my son's heat injury, which led health providers to take the more drastic measure of an ice bath, led to dropping his body temperature to 92.8, leading to hypothermia. Again, had there been someone available who could recognize the heat injury, especially in terms of body temperature readings of 103.3, as opposed to a heat stroke, 105 to 106 upward, less drastic measures would have been taken. My son had a fighting chance before this.

After leaving NTC, he was transported to the emergency room at Balboa for further observation and when stabilized there, he was transported to ICU at Balboa Naval Hospital, with a diagnosis of heat stroke. Five hours and 20 minutes had passed since his collapse. At Balboa, he presented with elevated enzyme and liver damage, thereby contributing to a decrease in the clotting factors.

I wonder if anyone knew that a patient presenting in sickle cell crisis and heat injury should be considered at risk for the development of DIC, and knowing that if he developed DIC, he would be more susceptible to infection, more difficult to treat with success? He did wear the red medical tag.

During his 7 days at Balboa, his heart became damaged; his liver became damaged; his clotting factors went haywire; his kidneys failed; and subsequently, he developed gastrointestinal bleeding. And his facial and body features became contorted because of the swelling. The delay in instituting antibiotic therapy at the initial temperature elevation of 103 was a mistake. Vascular cannula tips collected for cultures at this time, 3:47 on Saturday, March 22, were not received in the lab until 9:34 on Monday, March 24. This was a delay of 18 hours and 29 minutes. This was a mistake.

He developed the infection, staphylococcus aureus. The JAG report says, and I quote,

> It is reasonable to assume that the source of his infection and resultant acute bacterial endocarditis was through one of the cannulas because "staph" aureus with sensitivities similar to the organism present in blood cultures was grown from these cannulas.

It is well known that delay of appropriate antibiotic therapy is a significant factor leading to mortality in cases of acute bacterial endocarditis.

Further quoting from JAG,

> There was a significant delay between the removal of the vascular cannulas and their subsequent being placed in culture. The delay in removal of the cannulas and administration of antibiotics may be viewed as significant and that the delay may have contributed to Seaman Friend's death.

There was a lack of documented auscultation of the heart on March 23 and 24. Auscultation of the heart may have indicated the presence of a heart murmur which, in turn, might have provided a clue of endocarditis. A contemporaneous death note was not documented in the medical notes; there was no documentation of heart auscultation; there was no documentation of a complete physical examination at this time, March 23 and 24; there was no formal "Do Not Resuscitate" order documented. Therefore, guidelines for orders not to resuscitate established in Naval Medical Command Instruction 6320.2 were incompletely followed.

On the morning of my son's death when doctors made a decision to stop all blood products which amounted to his bleeding to death, there was no informed consent. They said that his condition then and their subsequent actions had been discussed with me and that I understood. Yes, I understood the verbiage, but I did not, could not, understand the finality of their thinking. I feel that the doctors knew well in advance of their decision, knew enough about my son's prognosis, that they should have called for a meeting of the ethics committee with me, his father and his sisters. Their decision and subsequent actions were medically unethical.

Because of our concerns and efforts, we have corresponded with many Government and Department of Defense officials. We have two letters, received through the inquiries of Senator Warner, relative to the educational and training programs in the Navy on the subject of heat exhaustion and heat stroke. One of those letters mentioned that the lesson presented in Company Commander School before our son's death did not include any information about the sickle cell trait, nor was such information provided in any other form. The other letter contradicts this.

We have another letter from former Secretary of Defense Caspar Weinberger, in response to our letter, in which we expressed 12 concerns pertaining to training policies and medical care for recruits. Mr. Weinberger addressed each of the 12 concerns that we submitted to him; however, we are afraid that the findings and conclusions of his letter do not go far enough in establishing precautions to protect military recruits. We felt then as we feel now, that those findings and conclusions outlined in Mr. Weinberger's letter should continue to be monitored to determine if they are sufficient to protect recruits in training.

In addition, Dr. [Colonel] John Kark of the Armed Forces Institute of Pathology, supplied us with an abstract of his most recent findings prior to publication in the *New England Journal of Medicine,* September 24, 1987, on the effects of sickle cell and the recruit. This article concludes that there is an increased risk of the recruit with sickle cell trait when in basic training and that risk becomes significantly higher with the older recruit.

Even though our son suffered from grave errors in medical treatment, we feel that in addition to medical negligence and malpractice, his death, as well as the death and injuries of many others, is attributed to administrative negligence at a higher level, by not following through on established policy.

As you can clearly see, none of the persons who might have been responsible for this tragedy or any other tragedy have been identified, nor are they even obscurely concerned because they are all protected by the *Feres* doctrine.

We are not alone in our suffering, for countless families have gone through the same experiences. Whereas a tragedy is no less a tragedy in any situation, the tragedy of which I am speaking today and those on whose behalf I am also speaking, occurred in peace time. This makes it more tragic, more of a mockery, and more ironic.

The legislation now before the Senate, S. 347, must not die in the Senate. It must live so that others will live a meaningful life. It must live so that my son's death will have not been in vain. As it stands now, we cannot truly live unless these grave injustices to our loved ones are rectified. We and other parents like us, and all grieving parents, need the gentle rains of justice to cleanse this air of oppressions that engulf us, not the raging storms of the *Feres* doctrine, that have perpetuated these injustices.

Our Government will not suffer if S. 347 is passed; on the contrary, the quality of our Government may be best judged and remembered by the magnitude of its concern for justice and human life. It is to this end that I am fighting. Please help all of us in all our efforts by passing this long overdue legislation to amend the *Feres* doctrine as a tribute to those who will have died in vain if it does not pass and to those who will ultimately benefit from its passage.

Thank you very much for allowing me this privilege to appear before you today.

Senator HEFLIN. Thank you very much for your testimony.

[The statement of Mrs. Friend follows:]

PREPARED STATEMENT OF MRS. PEGGY D. FRIEND

3111 Kingsdale Road
Richmond, Virginia 23237

(804) 275-8106

June 17, 1988

PREPARED STATEMENT OF MRS. PEGGY D. FRIEND

Mr. Chairman and Members of the Subcommittee, Goodmorning. My name is Peggy Drewery Friend, mother of Seaman James B. Friend, III who died on March 26, 1986 at Balboa Naval Hospital, San Diego, California. James was my first born and my only son and it is in his memory and on behalf of all military families who have suffered from medical malpractice and administrative negligence that I am speaking today. While I am aware that the legislation surrounding the Feres Doctrine will not affect my family or other families who have suffered in the past, it is my hope that my efforts as well as the efforts of CAMI will prevent further tragedies and injustices to military families and their survivors.

It was the last day, indeed the last few feet until basic training would be over for Company 18 at the Recruit Training Center at San Diego. 25 year old James, eagerly awaiting graduation where he would receive a commendation for being the most outstanding recruit in his Company, was engaging in those last few feet of the "freedom run" when he started falling behind. His shipmates noticed this and encouraged him to continue since this was quite unusual for James. But, James, sweating profusely and out of breath, could not continue. He collapsed, got up to continue, collapsed again. On the third try he did not get up.

According to eye-witness accounts, his training officers prodded him to continue, one even calling him a demeaning name. He complained of being "weak-kneed" and said that he had asthma. An ambulance answering another call was "waved on" because a training officer thought James to be "only winded." When it was realized that his condition was more serious, an ambulance was called. Between the time of his collapse, approximately 9:10 A. M. and his admission to ICU at Balboa Naval Hospital, approximately five (5) hours and twenty (20) minutes had passed. Within that time, he had been placed in an ice bath to lower his 103.3 temperature, which cooled his body to a subtemperature reading (92.8) and a potentially fatal one.

My son had suffered a severe heat injury and rhabdomyolysis - muscle death. Complicating his condition even more was the fact that he carried the sickle cell trait, a genetically inherited condition that causes the red blood cells to sickle, thus depriving the muscles and vital organs of oxygen. This condition can and did initiate multiple organ destruction. On the morning of March 26, 1986, seven days after he entered the hospital, my son died. Ironically he was wearing a red medical tag indicating that he carried the sickle cell trait.

When his temperature was dropped to 92.8, this threw him into hypothermia. One vital organ after another deteriorated, renal failure occurred, as did disseminated intravascular coagulation, (DIC) a serious, often fatal condition which does not allow the blood to coagulate. Finally, he contacted a nosocomial (hospital contacted) infection that invaded his entire body. This led to acute bacterial endocarditis.

Because any heat injury is a medical emergency and immediate body cool down is of vital importance, had there been someone on site who could recognize a serious heat injury as opposed to just being "winded" and/or what the red medical tag he wore meant in relation to a serious heat injury, my son's problems would not have escalated as they did. He lay on the ground too long without medical attention. I *do* feel that my son's death began at the recruit training level.

I began this investigation on April 11, 1986 by seeking the help of Congressman Tom Bliley and Senator John Warner. Through the inquiries of Congressman Bliley and SEnator Warner and my requests through The Freedom of Information Act, I received my son's medical records five (5) months after his death and a JAG Investigation Report eleven (11) months after his death.

JAG findings clearly conclude that mistakes at the training level *and* in the hospital *were* made and that those mistakes led significantly to my son's death. Upon my arrival at Balboa, I was told *emphatically*, "your son is *not* going to die." This is what happened. My son developed acute exertional rhabdomyolysis following one (1) hour of calethenics and the "freedom" run, and progressed to renal failure. He demonstrated the classical findings associated with this disorder, with serum enzymes rising sharply to extraordinary levels. Muscles became swollen, stiff, and painful.

After his collapse on March 19th, he was taken first to Naval Training Clinic where he was dipped in an ice bath to lower his body temperature. *This ice bath method can be potentially hazardous to one with sickle cell trait.* The misdiagnosis of my son's heat injury which led health providers to take the more drastic measures of an ice bath led to dropping his body temperature to 92.8, leading to hypothermia. Again, had there been someone available who could recognize a *heat injury*, especially in terms of body temperature readings (103.3) as opposed to a *heat stroke* (105-6 upward), less drastic measures would have been taken. My son *had* a fighting chance before this.

After leaving NTC, he was transported to the emergency room at Balboa for further observation and when stablized enough there, he was transported to ICU at Balboa Naval Hospital with a diagnosis of "heat stroke." Five (5) hours and 20 minutes had passed since his collapse. At Balboa he presented with elevated enzyme count, and liver damage, thereby contributing to a decrease in the clotting factors. I wonder if anyone knew that a patient presenting in sickle cell crisis and heat injury should be considered at risk for the development of DIC, and knowing that if he developed DIC, he would be more susceptible to infection, more difficult to treat with success? He did wear the red medical tag.

During his seven (7) days at Balboa, his heart became damaged; his liver became damaged; his clotting factors went haywild; his kidneys failed; and subsequently he developed gastrointestinal bleeding. And his facial and body features became contorted because of the swelling.

The delay in instituting antibiotic therapy at the initial temperature elevation of 103.3 was a mistake. Vascular cannula tips collected for cultures at this time 3:47 on Saturday, 22 March were not received in the lab until 9:34 on Monday 24 March. This was a delay of 18 hours and 29 minutes. This was a mistake. He developed the infection, staphyloccus aureus. The JAG report says and I quote, "It is reasonable to assume that the source of his infection and resultant acute bacterial endocarditis was through one of the cannulas because "staph" aureus with sensitivities similar to the organism present in blood cultures was grown from these cannulas." It is well known that delay of appropriate antibiotic therapy is a significant factor leading to mortality in cases of acute bacterial endocarditis."

Further quoting JAG, "there was a significant delay between the removal of the vascular cannulas and their subsequent being placed in culture. The delay in removal of the cannulas and administration of antibiotics may be viewed as significant in that the delay may have contributed to Seaman Friend's death."

There was a lack of documented auscultation of the heart on 23 and 24 March. Auscultation of the heart may have indicated the presence of a heart murmur which in turn, might have provided a clue of endocarditis.

A contemporaneous death note was not documented in the medical notes; there was no documentation of heart auscultation; there was no documentation of a complete physical examination at this time, 23, 24 March; there was no formal "Do Not Rescuscitate" order documented. Therefore, guidelines for orders not to resuscitate established in NAVMEDCOM INSTR 6320.2 were incompletely followed.

On the morning of my son's death when doctors made a decision to stop all blood products which amounted to his "bleeding to death," there was no informed consent! They said that his condition then and their subsequent actions had been discussed with me and that I understood. Yes, I understood the verbage, but I did not, could not understand the finality of their thinking. I feel that the doctors knew well in advance of their decision, knew enough about my son's prognosis, that they could have, should have called for a meeting of the ethics committee with me, his father, and his sisters. Their decision and subsequent actions were medically unethical.

Because of our concerns and efforts, we have corresponded with many government and Department of Defense officials. We have two letters, received through the inquiries of Senator Warner, relative to the educational and training programs in the Navy on the subject of heat exhaustion/heat stroke. One of those letters mentioned that the lesson presented in Company Commander School before our son's death did not include any information about Sickle Cell Trait nor was such information provided in any other form. The other letter contridicts this.

We have another letter from former Secretary of Defense Caspar Weinburger in response to our letter in which we expressed twelve (12) concerns pertaining to training policies and medical care for recruits. Mr. Weinburger addressed each of the twelve concerns that we submitted to him; however, we are afraid that the findings and conclusions of his letter do not go far enough in establishing precautions to protect military recruits. We felt then as we do now, that those findings and conclusions outlined in Mr. Weinburger's letter should continue to be monitored to determine if they are sufficient to protect recruits in training.

In addition, Dr. (Colonel) John Kark of the Armed Forces Institute of Pathology supplied us with an abstract of his most recent findings, prior to publication in The New England Journal of Medicine (24 Sept 87), on the effects of sickle cell trait and the recruit. This article concludes that there is an increased risk of the recruit with sickle cell trait when in basic training and that risk becomes significantly higher with the older recruit.

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Please help all of us in all our efforts by passing this long overdue legislation to amend the Feres Doctrine as a tribute to those who will have died in vain if it does not pass and to those who will ultimately benefit from its passage.

Thank you very much for allowing me this privilege to appear before you today.

Senator **Heflin**. There might be some questions submitted in writing. If so, we'd request a prompt response. We will keep the record open for 2 weeks.

Thank you. The hearing is adjourned.

[Whereupon, at 10:20 a.m., the subcommittee was adjourned, subject to the call of the Chair.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

TESTIMONY ON S. 347 BY DOROTHY O. MEAGHER

Mr. Chairman and members of the sub-committee, thank you for the opportunity to testify in favor of amending the 1950 Feres Doctrine, S347. I'm sure you're aware of what happened to our son Jerry on January 18, 1974, but let me refresh your memory.

Jerry was a bright young man, an honor student. He planned to be a lawyer. He was due out of the navy in June 1974. He had made plans to attend the University of Arizona, beginning with the fall, 1974 semester. He was home on leave for eighteen days during the 1973-74 holidays. He spoke to us about the cyst on his arm. He told us, he had been to the naval hospital in San Diego December 10, 1973. They had taken tissue xrays and set up an appointment for him to enter the hospital, January 17, 1974, (which happened to be his twenty-second birthday).

To satisfy me, while he was home on leave, Jerry agreed to have our family doctor check his arm. Our doctor agreed with the navy doctors, that it was just a fatty tumor and required minor surgery. He assured us he was 99% sure it wasn't malignant but it should be removed. He said he could remove it in his office, (he had removed a similiar one on Jerry's Dad's breast, a couple of years before)but since Jerry didn't want his arm sore while on leave and already had it set up with the navy, he didn't. He also said, it won't cost him anything to have the navy remove the cyst. Little did we know the cost of that decision. Jerry had a great time while on leave and none of us worried about the minor surgery, he was to have when he returned to San Diego.

Jerry was an electronics technician aboard the USS Halsey, docked in San Diego. He enjoyed the electronics work and planned to use it for part-time work while going to school. He requested and received permission to be excused from his duties aboard ship to enter the naval hospital. He had no way of knowing at the time and was not told, that the navy in order to circumvent the law, would transfer him on paper to the hospital. This way he would still be active duty and be under the Feres Doctrine. Of course at that time, none of us had ever heard of the Feres Doctrine.

Jerry walked into the hospital a healthy young man, according to the doctors at the naval hospital. Due to the incompetence, negligence and egotism of three doctors, he left five months later on a stretcher, a severely brain-damaged quadraplegic.

The Department of Defense says, it will disrupt discipline to amend the Feres Doctrine. I think it will disrupt discipline, not to amend the Feres Doctrine. In order to discipline anyone, you first need to gain their respect. How can our young men and women in the military respect officers that approve of circumventing the law? How do we teach our children to respect and obey the law, and to do their duty for this country, even if it means dying to protect the rights we have? We know there is always danger even in peace time of being injured or killed in the line of duty, but not in a military hospital for minor surgery. How do we teach our children to expect to pay for their mistakes, when three doctors never paid for ruining Jerry's life.

I lived for five months in the I.C.U. waiting room of the naval hospital, while Jerry was fighting for his life. Most of the doctors I met were good doctors and honest men. Several offered to testify on Jerry's behalf if we ever got his case to court. Of course we never did, we tried, but the Supreme Court in October of 1977, refused to review the case on the grounds of the Feres Doctrine.

We were so angry to find out the Feres Doctrine existed and believed it would have to be changed, once it was brought to the attention of the people. We still believe that after almost fourteen years. We made a promise to Jerry, we would fight for as long as we live to amend the Feres Doctrine. Finding out that federal prisoners have the right to sue the government for medical mal-practice, but our military men and women do not have this right, makes this unjust law even harder to believe. Shouldn't prisoners require more discipline than the young men and women who volunteer to serve their country?

Another D.O.D. argument is, we would be opening a pandora's box if we amend the Feres Doctrine. I believe the Feres Doctrine is a pandora's box. No one including the justices believe it's fair and have said, "If congress thinks we interpret their intentions wrong, they have a ready remedy to clarify their intentions". Why can't the D.O.D. see that the fair thing would be to pay the insurance for the doctors in the military. Punish the doctors for negligence and not just transfer them to another hospital where they can continue to be negligent?

The D.O.D. says we don't need to amend the Feres Doctrine because they are improving military medicine. That isn't the only answer. Of all the doctors I met during the five months at the naval hospital, there were probably only six out a hundred that had an egotistical attitude. The rest were good honest men and considered themselves doctors first and officers second. The orders they gave were medical orders from doctor to patient not officer to soldier. If the D.O.D. is not willing to be responsible for what goes on in military hospitals, maybe it's time they got out of the business. They could furnish health insurance for our military personnel and let them go to civilian hospitals. Sure there will still be mistakes but someone will be responsible for those mistakes.

Another D.O.D. argument is we don't need to amend the Feres Doctrine because, the government compensates the victims of medical mal-practice and they are eligible for V.A. Hospital care. Jerry was retired out of the navy with 100% disability. They award 100% disability if they are unable to work. What happens if they are not only unable to work but unable to care for themselves? What happens if they are unable to turn themselves over in bed? What happens if they require a one on one TOTAL CARE to survive? What happens when you have to depend on someone to get you on the toilet for your b.m.'s and what happens if they don't get you there in time? What happens when you can say a few words but are unable to communicate enough to tell someone you are in pain or need to go to the bathroom, or maybe you want a drink of water or food?

I will tell you what happened in Jerry's case. I spent two and ahalf years in three hospitals with him, first the Naval Hospital, then the Tucson V.A. Hospital and finally the Cochise County Hospital, extended care ward. He got bedsores from not being turned and lay in his b.m.'s and urine until the sheets were circled and drying around the edges. So I stayed with him most of the time and learned how to care for him. I kept him clean and massaged all the bony areas with lotion to prevent bed sores. I turned him when he was uncomfortable and learned to do range of motion therapy on him several times a day. I also cleaned up his b.m.'s just as I had done when he was a baby. Those two and ahalf years were not easy on me or the rest of the family. His Dad had to stay home and work and be with our two daughters. They were only fifteen and seventeen at the time. They needed me too, but we all agreed Jerry needed me more. We could accept death but we couldn't accept him being neglected to let him die.

We were finally able to bring him home to stay on June 8, 1976, over eleven years ago. It has not been easy but we are together. We use Jerry's compensation and our own money to hire people to help me care for him. He has had chemical pneumonia twice in the past ten years and both times were at the V.A. Hospital when we took him for a check-up. The last time was in April, 1986, we made the decision then, not to take him back. As I said before we can accept him dying but not because of neglect and carelessness. According to one doctor at the V.A. Jerry would be dead in a month if we put him in the V.A. Hospital, from our experience I don't believe he would live a month.

According to William H. Taft of the D.O.D., if the compensation isn't enough, all we have to do is ask congress to pass a private bill for Jerry. We all know what the chance of that happening is, practically nil. Only one congressman was ever willing to present a private bill and that was Jim McNulty of Arizona in the 98th congress.

According to Dr. Jarrett Clinton of the D.O.D., they are tired of hearing about Jerry's case because it is an old case. What makes it an old case since Jerry is still alive? Nothing has been resolved for Jerry. No one has told us Jerry will be taken care of when we die. Our main concern is what will happen to him if something should happen to us. What will happen to him when his Dad is no longer able to work six days a week or when I'm unable to help with his care?

All the money in the world will not compensate Jerry or us for what the doctors did to him. Nothing can change what happened but the very least they owe him, is to pay for the care he requires to survive for as long as he lives. He doesn't have the same life he had before but with love and good care he does still have a life. Not the life he chose but a life where he is content and happy most of the time. We live with the fact that Jerry could die at anytime but that isn't our biggest fear. Our biggest fear is that he will outlive us and be neglected until he dies. How many others have died because of lack of funds to care for them? How much longer will we be able to take care of Jerry? These are the questions we live with daily. We don't have the answers.

We believe in this country and the basic fairness and goodness of the people. This is why we believe the Feres Doctrine will be amended. Amending the Feres Doctrine will not change what happened to Jerry and many other young men and women but it will help our future young men and women in the military. I believe by amending the Feres Doctrine they will receive better care and if mistakes are made they will have recourse. Jerry wanted to be a lawyer because he thought there were some unjust laws that should be changed. He felt the best way to change them was through the system because he believed in the system. Sometimes I think amending the Feres Doctrine is what his life is all about. I know he gives us the strength to continue the fight.

Please join us in amending the Feres Doctrine by supporting S347. Then what happened to Jerry and others while serving their country will not be for nothing. Thank you.

Sincerely,

Dorothy O. Meagher

Dorothy O. Meagher
(Jerry's Mother)
569 Buena Vista Place
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April 29, 1988

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Commanding Officer
Litigation Division
Office of the Staff Judge Advocate General
DAJA-LTZ
Pentagon
Washington, D. C. 20310

RE: Inconsistent Litigation Positions
Gary W. Kendrick and Shane Kendrick,
a minor child vs. The United States
of America

Dear Sir:

Russell H. Putnam, Jr. and I represent Gary W. Kendrick and Shane Kendrick, who filed a law suit in the Federal District Court in Columbia, South Carolina for medical malpractice involving a service member on the Temporary Disability Retired List (TDRL). I am enclosing a copy of our original pleadings, the Answer filed on behalf of the United States, the decision of the Federal District Court and our brief which was filed in the lower court. We are currently perfecting an appeal to the Fourth Circuit Court of Appeals in the above-styled case.

I am writing this because the United States of America is taking inconsistent positions concerning compensation for service members who are injured in their TDRL status. Service members who are injured while on the TDRL status for an injury that was not related to their being placed on military disability or not service connected are not compensated by the military disability system or by the Veterans Administration for these new injuries. On the other hand, in several recent cases, the United States of America has contended that injuries to individuals on the TDRL are barred from recovery by the *Feres* doctrine because those individuals are considered to be on active duty.

Over the last ten or twenty years, hundreds, and possibly thousands of service members have been denied benefits that could amount to hundreds of millions of dollars as a result of this long standing principle. However, in the *Kendrick* case, and also in the case of *Ricky Ricks vs. The United States* (copies of those decisions are attached), the United States of America is now taking the position that all injuries to service members while they are in the TDRL status are incident to service and thus barred by the *Feres* doctrine. The position taken by the United States in the *Kendrick* and *Ricky Ricks* cases may reduce liability for medical malpractice that occurred while members were on the TDRL. However, by upholding the government's position in the *Ricky Ricks* case and in the *Kendrick* case, the United States of America is opening itself up to liability that could amount over a period of years to hundreds of millions of dollars in excess over any potential liability for medical malpractice cases. This is because a significant percentage of service members who are on the TDRL suffer other disabling incidents that are not related to their military duties.

For example, if a service member, while on the TDRL for diabetes or for orthopaedic problems, has a heart attack, the government's position for years has been that the service member would not be entitled to disability for that heart condition unless the heart condition was related to the physical disability for which he was discharged or otherwise directly related to his military service. This happens in many cases.

Another common example occurs when individuals placed on the TDRL for one condition, and while on the TDRL, are involved in automobile accidents. The military Physical Evaluation Boards and the Veterans Administration have consistently held that those activities are not incident to service and are denying disability benefits for injuries that occur during their TDRL status.

The implications to the Veterans Administration concerning all the cases on the TDRL are also in issue. As you may be aware, the Veterans Administration only pays disability benefits to those who are not on active duty. The Veterans Administration does pay disability benefits to individuals on the TDRL because the Veterans Administration does not consider individuals on the TDRL as being active duty (See 38 USC 3104(c); 38 USC 3105). This is a direct contradiction to the policy of extending the Feres doctrine to individuals on the TDRL.

If individuals on the TDRL are classified as being active duty, the Veterans Administration has improperly paid benefits to those on the TDRL for years. However, it appears that the Congressional intent as implied in 38 USC 3104 (c) is that individuals on the TDRL are not on active duty and are to be treated as retirees. If they are to be treated as retirees for pay purposes, they should also be treated as retirees for military disability compensation and for Federal Tort Claims Act purposes.

Furthermore, an important rationale for the Feres decision was that there is an adequate remedy under the military disability system and Veterans Administration disability system for those who are injured on active duty. However, the current inconsistent policies held by the United States of America leave those individuals injured by the Federal government while on the TDRL without an adequate remedy. Those individuals cannot collect benefits from the United States Army or the Veterans Administration for injuries that occurred while on the TDRL, nor are they permitted to sue the United States Army for negligence.

In our lawsuit we have requested, in our discovery process, any memorandums relating to this policy. Additionally, I would draw your attention to paragraph 7-11, Disposition of the TDRL Member of Army Regulation 635-40. A portion of that subsection 7-11 A.5, unfit not in the line of duty disability, subsection (a) "A member may recover from the disability causing his name to be placed on the TDRL. While on the TDRL he may incur another unfitting disability and he may be separated without benefits" (emphasis added).

If the policy to deny the claims in the Ricky Ricks case and in the Kendrick case remains unchanged, the United States has established a position that any injury which occurs to a person on the TDRL is compensable under the Military Disability Law and the Veterans Administration disability law. I do not believe that this was, or is, the intent of Congress, the United States Army or the Veterans Administration.

If this is the new United States policy, then the United States should reconsider all individuals previously denied disability benefits for injuries or disease which occurred while on the TDRL and compensate them for their injuries. On the other hand, if the position of the United States has not changed, then reconsider the Ricky Ricks and Kendrick cases.

With kindest personal regards, I remain

Sincerely yours,

KILPATRICK AND PARDUE

Chuck R. Pardue

CRP/sdt

cc: General Counsel
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730 Peachtree Street, N. E.
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Kathy S. Kendrick

Gary W. Kendrick

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Gary W. Kendrick and Shane Kendrick,) Civil Action No.: 3-87-3376-16
a minor child,)
)
Plaintiffs,)
) Notice of Motion and Motion to
vs.) Alter or Amend Judgment
)
The United States of America,)
)
Defendant.)

To: Vinton D. Lide, Esquire
United States Attorney for the District of South Carolina
R. Emory Clark, Esquire
Assistant United States Attorney for the District of South Carolina
Attorneys for the Defendant
Post Office Box 2266
Columbia, South Carolina 292020

YOU WILL PLEASE TAKE NOTICE that Counsel for the Plaintiffs, Gary W. Kendrick (Mr. Kendrick) and Kathy S. Kendrick (Mrs. Kendrick) will move the Court pursuant to Rule 59(e) of the Federal Rules of Civil Procedure at 9:00 a.m. on May 15, 1988, in Courtroom Number 3 of the Federal Courthouse, 1845 Assembly Street, Columbia, South Carolina or at such time and place as the Court may appoint to alter or amend its judgment and/or Order of April 25, 1988 (Order) in which it granted the Defendant's Motion for Summary Judgment. The grounds for this motion are:

1. The Veterans Administration (VA) only pays disability benefits to individuals who are not on active duty. Consequently, it pays disability benefits to Temporary Disability Retired List (TDRL) members because such individuals are not considered to be on active duty. 38 USCA §§3104(c), 3105; AR-635-40 para. C-11a. This policy is a direct contradiction and refutation of extending the Feres doctrine to TDRL members. If, as this Court has ruled, TDRL members are considered to be in an active duty status, the VA has improperly paid benefits to such individuals. Furthermore, under the Court's ruling, the Army has participated in and encouraged such improper payments. AR-635-40 para. C-11. Since Congress has permitted and funded such payments for years, it is illogical to conclude that individuals on TDRL are in the same status as those on active duty. Under well-settled principles of construction, statutes and regulations which appear to be in conflict should

be construed so as to allow each to stand and to give effect to each. Furthermore, the canons of statutory construction require that statutes be construed in such a manner so as to avoid absurd and/or illogical results.

A careful reading of the previously cited sections of Title 10 and Title 38 of the United States Code demonstrates a clear Congressional intent that TDRL members are not in an active duty status and are to be treated as any other retiree. If they are to be treated as retirees for all other purposes, it is only rational, just and fair to recognize the rights of TDRL members to recover under the Federal Torts Claims Act (FTCA). If an individual is not on active duty, any injuries which he or she suffers do not arise out of or in the course of activity incident to service. As a result, Feres does not bar a suit by a TDRL member. Crumpler v. United States, 495 F. Supp. 266 (S.D.N.Y. 1980)

2. Under AR-635-40 para. 7-11 A.5, the Army may separate a TDRL member without benefits who incurs another unfitting disability. If such an individual were in an active duty status, the Army and/or VA would be obligated to pay for his or her care and treatment. 38 USCA §105. The effect of the Order is to overrule long standing Army and VA policy and to impose upon these agencies almost unlimited liability and obligations. Such a result contradicts the clear intention of Congress.

3. The Court's reliance on the rationale in the case of Ricks v. The United States, _____ F.2d _____ (11th Cir. 1988) is misplaced because the issues raised in this case regarding the interrelationship of the statutes and regulations governing the VA and the Army were not raised by the parties in that case or considered by the Eleventh Circuit.[1] To the extent that this Court and the Ricks Court relied on the decision in Anderson v. U.S., 575 F. Supp. 470 (E.D. Mo. 1983), such reliance is misplaced. It does not appear that the Anderson Court considered the previous mention interrelationship.[2]

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[1] Counsel has obtained a copy of the transcript of record and briefs in Ricks and will submit them as Exhibits to the Plaintiff's supporting memorandum. Counsel is also informed that the Appellant in Ricks has petitioned the Eleventh Circuit for rehearing in that case.

[2] Counsel has obtained a copy of the Plaintiff's memorandum in Anderson and will submit it as an Exhibit to the Plaintiff's supporting memorandum.

Furthermore, Anderson involved a member of the United States Navy. As the Court is aware, the Navy, unlike the Army, has court-martialed two (2) naval retirees in the period between the end of World War II and the present.

4. Members of the Army who are placed on its TDRL are in and enjoy the same status as any other Army retiree. (10 USCA §§101(4), 802(4), 3075; AR-635-40 para. C-8. Suits for medical malpractice against the United States by Army retirees are not barred by the rules established in Feres v. United States, 340 U.S. 135 (1950).

5. The Court's granting of the Defendant's Motion for Summary Judgment was inappropriate where there exists a dispute over jurisdictional facts. The appropriate action would have been to continue to motion and allow the parties to engage in discovery to develop the facts raised by grounds 1-6, supra. See Crumpler v. U. S., 475 F. Supp. 266 (S.D.N.Y. 1980)

6. The Court's granting of the Defendant's Motion for Summary Judgment was inappropriate upon a determination that the United States is immune from liability under the Federal Torts Claims Act. In such a case the proper disposition is a dismissal for lack of subject matter jurisdiction. Atkinson v. U.S., 804 F.2d 561 (9th Cir 1986).

7. The United States has waived the Feres doctrine by settling the claims of the estates and families of the military members of the crew of the space shuttle, U.S.S. Challenger. To allow the United States to selectively invoke the Feres doctrine to deny the recovery of meritorious claims is to allow it to treat human beings in a completely arbitrary and capricious manner. The Courts of this country should not permit themselves to be partners in a process which serves on one hand as a shield to hide the incompetency and negligence of the United States and, on the other hand, as a sword to cut-off the meritorious claims. Such a result is intolerable in a civilized society.

8. Congress's intent in enacting the FTCA was to provide those injured by the United States' negligence with a remedy where none had previously existed. By extending Feres to the TDRL, the Court has deprived the Plaintiffs of any remedy for their injuries which were suffered while Mr. Kendrick was on the TDRL. Such a result is a clear contravention of the intent and policies expressed in the FTCA.

9. If Feres bars the Plaintiffs' suit, the Plaintiffs assert that Feres was wrongly decided and should be overruled. Its application to suits

by military personnel has resulted in irrational, arbitrary and capricious results Atkinson v. U.S., 825 F.2d 202, 206 (9th Cir. 1987). As Judge Noonan has stated, "[c]ommon sense suggests that a single tortious act should not result in different legal consequences for difference victims." Id at 206. When a judge-made rule is so badly out of touch with reality and justice, it is incumbent upon the courts to change or modify the rule. Traynor, Law and Society In A Democratic Society, 1956 U. Ill. L. F230, 232. The Plaintiffs request that Feres be overruled as being in conflict with the clear intent of Congress, common sense and justice.

10. By summarily denying the claim of Shane Kendrick, the Court has visited the status of his parent upon him and denied him fundamental rights. Such a jurisprudence is as primitive and repulsive as punishing a child for the sins of his parents. It is both outmoded and unconstitutional. See Levy v. Louisiana, 391 U.S. 68, 88 (1968). It is as outmoded and primitive as denying a person an opportunity to participate fully in our society because of his or her age, race, religion and/or sex. Thankfully, American society has evolved to such a point that it no longer tolerates such treatment in those areas. It is high time that our society progress to a point where it also recognizes the claims and rights of our children. A child should not be deprived of his or her right to seek redress for his injuries simply because of the status of his parent. Historically, the courts of this country have extended special solicitude and care to children. The Plaintiffs asked that this Court extend that same solicitude and care to Shane and allow him to recover for his injuries.

This motion is based upon the records, files and pleadings of this case and the memorandum and supporting documents as shall be filed.

Russell H. Putnam, ~~Jr.~~
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(803)799-9435

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ATTORNEYS FOR THE PLAINTIFFS

Columbia, South Carolina

May 5, 1988

NMFA
National Military Family Association
2666 Military Road, Arlington, Virginia 22207-5118
(703) 841-0462 (703) 841-0121

June 15, 1988

The Honorable Howell Heflin
728 Hart Senate Office Building
United States Senate
Washington, DC 20510

Dear Senator Heflin:

The National Military Family Association (NMFA) supports initiatives allowing active duty service members to have recourse to fair and equitable financial awards in cases of medical and dental malpractice or medical and dental negligence. The military member should be allowed the same options as dependents and retirees now have: administrative review process outside the continental United States and a choice of judicial review or administrative review inside the continental United States. NMFA opposes any reduction in government benefits that would be required when an award is made.

Sincerely,

Syd T. Hickey

Sydney T. Hickey
Director of Government Relations

16 June 1988

Senator Jim Sasser
Attn: Evelyn Boyd
363 Senate Russell Office Building
Washington, DC 20510-4202

Re: SB 2490, concerning malpractice suits for active duty service members

I am the wife of retired US Air Force Lieutenant Colonel Gary N. Barber. He was diagnosed with terminal cancer (metastisized malignant melanoma) in January 1988 and was told he would probably expire in six to twelve months.

While exploring his medical history, physicians at Wilford Hall Medical Center, Lackland AFB, Texas, discovered that Gary had requested the removal of a mole from his left foot in 1982. At that time he was assigned to Davis-Monthan AFB, Tucson, Arizona. The pathologist who interpreted the tissue sample reported it to be a benign junctional nevus, as shown in Exhibit A attached.

Wilford Hall physicians suspected otherwise, sent for the biopsy slides, and examined them. Their finding, that the 1982 sample was indeed malignant is detailed in Exhibit B. Wilford Hall then filed a Quality Assurance Inquiry on the Tucson doctor, as it should have been obvious that the tissue was malignant. Wilford Hall will not release the results of that inquiry.

Tragically, we spent over five years with no knowledge of Gary's illness. It went untreated when the chances of a successful outcome were higher than they are during advanced stages of the disease. The Tucson physician's blunder will soon cost Gary his life - it has already cost him his career. Neither he nor I has any legal recourse against the Tucson doctor due to the Ferris Doctrine. (The doctor is a government civil servant.)

I urge you to use this information during upcoming hearings on SB 2490. It is imperative that military members and dependents enjoy the same rights granted the general public when such rights do not interfere with the services' order and discipline. It is equally critical that military physicians understand they are accountable for their actions and are not getting free malpractice protection.

I support early passage of SB 2490 and any additional work necessary to ensure that it and HR 1054 become law. If I may be of any assistance, please do not hesitate to contact me.

Kathie S. Barber

Kathie S. Barber
3500 Oakgate #3203
San Antonio, Texas 78230
(512) 690-9390

cf: Sen LLoyd Bentsen
Sen Phil Gramm

★ 4E11 37 ARRS

515-109

MEDICAL RECORD | TISSUE EXAMINATION

SPECIMEN SUBMITTED BY: Dermatology

DATE OBTAINED: 22 Jun 82.

SPECIMEN: Skin, (L) lateral foot, excisional bx

BRIEF CLINICAL HISTORY *(Include duration of lesion and rapidity of growth, if a neoplasm)*

At least 8 yr hx 8 x 14 mm slightly elevated brown-black plaque c̄ some color variation in center (tan pink) & irregularity of edges. Recently "irritated".

PREOPERATIVE DIAGNOSIS

Junctional nevus vs D&E nevus R/O acral lentiginous melanoma

OPERATIVE FINDINGS

POSTOPERATIVE DIAGNOSIS

SIGNATURE AND TITLE

[illegible] R. [illegible], LT COL, USAF, MC
[illegible]
USAF HOSPITAL [illegible]

PATHOLOGICAL REPORT

NAME OF LABORATORY

ACCESSION NO (S): S82-1426

(Gross description, histologic examination and diagnoses)

Specimen consists of an elipse of skin 2.3 x 1.4 x up to 4 mm in thickness. There is a 1.3 x .9 cm dark brown plaque. Sections are taken through this region. Microscopic examination reveals a junctional nevus with nevus cells dropping off into the dermis with evidence of junctional activity with scattered melanin pigment. There are scattered clusters of nevus cells present in the epidermis. There is no inflammatory infiltrate.

Diagnosis: Junctional nevus (left lateral foot, excisional biopsy)

25 JUN 82

(Continue on reverse side)

SIGNATURE OF PATHOLOGIST: AJ Furcolow

DATE

	AGE 37	SEX	RACE Cauc	IDENTIFICATION NO

PATIENT'S IDENTIFICATION *(For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)*

REGISTER NO | WARD NO

NAME Barber, Gary.
RANK/STATUS ADAF Cpt.
SSAN 466-78-9955
CLINIC DERM UNIT B
DATE ____ [illegible] 0-4754

HP-8858352

TISSUE EXAMINATION

STANDARD FORM 515 (REV 9-77)
Prescribed by GSA and ICMR, FPMR 101-11.806-8

*U. S. GOVERNMENT PRINTING OFFICE 1981—346/567

EXHIBIT A

```
CONNECTED
       RECENT LAB RESULTS  for  BARBER,GARY  #20.465.78.9955

  TISSUE REPORT  A02-FEB-88 09:53 AM Source : S01598-7
                   , PATHOLOGIST, SMITH MT  7741 ADAIR/EG/
                   , PROCEDURE, BIOPSY
                   , LOCATION -, SKIN OF LEFT LATERAL
                   , LOCATION:, FOOT
                   , DIAGNOSIS: - MALIGNANT MELANOMA BRESLOW'S LEVEL 2.12 MM
                   (SEE COMMENT) COMMENT: The biopsy has been examined
                   by several observers, all disagree with the
                   previous diagnosis of "junctional nevus" and consider this
                   to be an invasive melanoma. The nests of tumor extend
                   to the junction between the reticular
                   dermis and the subcutis, thus representing either a
                   deep Clark's level IV or a superficial Clark's level V lesion.
                   , CODE 1, M87203
   Press <RETURN> to continue with more data, type X and press <RETURN> when
                 you have finished with this patient's data.?



       RECENT LAB RESULTS  for  BARBER GARY  #20.465.78.9955
  TISSUE REPORT  A15-JAN-88 04:19 PM Source : S00728-1
                   , PATHOLOGIST, SMITH M   7741 TAA/MCQUAID
                   , PROCEDURE, EXCISION
                   , LOCATION - AREA OF LEFT
                   , LOCATION:, CLAVICULAR
                   , DIAGNOSIS: - METASTATIC MALIGNANT MELANOMA (SEE
                   COMMENT) COMMENT: Electron microscopy (EM #T-3-88) on
                   this specimen shows numerous cells containing
                   both melanosomes and pre-melanosomes.
                   , CODE 1, M80706
                   , CODE 2, M87203
  TISSUE REPORT  A14-JAN-88 10:16 AM Source : S00588-9
                   , PATHOLOGIST, ADAIR C  5409 ENB/
                   , PROCEDURE, BIOPSY
                   , LOCATION - GREATER CURVATURE OF
                   , LOCATION:, STOMACH
                   , DIAGNOSIS: - BENIGN GASTRIC FUNDIC MUCOSA
                   , CODE 1, M00140
   Press <RETURN> to continue with more data, type X and press <RETURN> when
                 you have finished with this patient's data.?


       RECENT LAB RESULTS  for  BARBER,GARY  #20.465.78.9955
```

EXHIBIT B

LAW OFFICES
KILPATRICK & PARDUE
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
246 DAVIS ROAD, SUITE D
AUGUSTA, GEORGIA 30907

ANDREW J. KILPATRICK, II
CHUCK R. PARDUE (ALSO TENNESSEE)

(404) 860-9292
(404) 858-1100
FAX (404) 860-8188

JUN 23 '88

June 21, 1988

Senator James Sasser
569 U. S. Courthouse
Nashville, Tennessee 37203

RE: Request for Assistance
Inconsistent Determinations by the
Veterans Administration and the
Department of the Army

Dear Senator Sasser:

I am aware that you are sponsoring the bill to modify the Feres doctrine in the United States Senate. It should be noted that the United States of America is now extending the Feres Doctrine to cover cases of individuals who are on the Temporary Disability Retired List (TDRL). Individuals on the TDRL receive a discharge certificate (DD Form 214), have their pay reduced, are relieved from any active duty requirements, and are sent home to recover from their illness or injury pending a final resolution of their case.

For years the Veterans Administration and the Department of the Army have considered individuals on the TDRL to be retirees. For example, the Veterans Administration under 38 U.S.C. Section 3104 (c) and 38 U.S.C. Section 3105 pay disability benefits for those individuals on the TDRL. The statute indicates that the disability benefits are not to be paid to anyone on active duty. However, in recent cases and official Army policy, individuals on the TDRL are now considered to be active duty and therefore, if they have injuries inflicted by the Federal government, they are to be considered as incident to service and consequently barred by the Feres doctrine. On the other hand, individuals who receive injuries not ~~from th~~e federal government, for example, a automobile accident, while they are on the TDRL are denied disability benefits for those subsequent injuries. Individuals who are on active duty who have automobile accidents are compensated for those injuries.

Additionally, several Comptroller General Decisions have held that those on the TDRL are retired and not entitled to certain benefits that accrue to those on active military duty. (See Matter of Daniel F. Cojka, 63 Comp Gen. 210 and Matter of Edgar K. Epp, 65 Comp Gen. 461) Given current Department of the Army policy as expressed in the responsive pleadings in the Ricky-Ricks vs. United States and Kendrick vs. United States cases, that treats TDRL individuals as active duty, all of those Comptroller General decisions as well as Veterans Administration decisions will have to be reconsidered.

It would appear a better policy would be to treat all individuals who have been discharged and issued a DD Form 214 (Discharge Certificate) and placed on the TDRL as being retirees. This would be consistent with the intent of Congress and administrative decisions of both the Veterans Administration and the Comptroller General.

I am enclosing my most recent pleadings in the case of Kendrick vs. The United States, as well as a letter that I have written to the United States Army and the Veterans Administration asking for a clarification of these inconsistent policies. However, we sincerely believe that without intervention from Congress, our clients and others similarly situated will have little or no relief. Your assistance in resolving this with both the Veterans Administration and the Department of Defense would be greatly appreciated. On behalf of Gary W. Kendrick and Shane Kendrick, we thank you in advance for any time and consideration that you can give on this important subject.

With kindest personal regards, I remain

Sincerely yours,

KILPATRICK AND PARDUE

Chuck R. Pardue

Chuck R. Pardue

CRP/sdt

cc: Gary W. Kendrick
Kathy Kendrick
Russ Putnam, Attorney at Law
C.A.M.I.

Decisions of
The Comptroller General
# of the United States

VOLUME 63

OCTOBER 1, 1983 TO SEPTEMBER 30, 1984

UNITED STATES
GENERAL ACCOUNTING OFFICE

[B-212738]

Leaves of Absence—Annual—Accrual—Crediting Basis—Military Service—Temporary Disability Retired List Status Effect

A servicemember received a Veterans Readjustment Appointment (5 C.F.R. Part 307) as a civilian employee during the time his name was on the Temporary Disability Retired List (TDRL) (10 U.S.C. 1202 and 1205) and was credited with his military service for annual leave accrual purposes (5 U.S.C. 6303). Under those provisions retired servicemembers may only receive such credit for leave purposes in limited circumstances. Since "temporary retirement" is "retirement," and since the member's disability does not meet the criteria stated in 5 U.S.C. 6303(a)(A) (i) or (ii), nor does his service time qualify under 5 U.S.C. 6303(a) (B) or (C), so long as he remains in a TDRL status, none of his service time may be credited for annual leave accrual purposes.

Leaves of Absence—Annual—Accrual—Crediting Basis—Military Service—Temporary Disability Retired List Status Effect

A servicemember who received a Veterans Readjustment Appointment to a civilian position during the time his name was on the TDRL was not entitled to credit his military service time for annual leave accrual under 5 U.S.C. 6303. On question as to whether impediment to crediting such service is removed upon subsequent removal of his name from that list, upon removal, a member is either retired for permanent disability, separated from the service with severance pay, or returned to active duty for full duty, or for retirement for length of service. Only the condition of separation with severence pay would permit such crediting, unless as a retired member one or more of the conditions in 5 U.S.C. 6303(a) (A), (B), or (C) are met.

Leaves of Absence—Annual—Accrual—Crediting Basis—Military Service—Temporary Disability Retired List Status Effect

A servicemember who is a civilian employee while his name is on the TDRL and not entitled to credit his military service for annual leave accrual under 5 U.S.C. 6303 during that time is only entitled to such credit effective as of the date of removal of his name from the list, if he is placed in a non-retirement status. This is so because the basis for crediting annual leave at one of the rates specified in 5 U.S.C. 6303(a)(1)-(3) is predicated on the completion of creditable years of service at the close of a biweekly pay period, with the applicable annual leave rate for "each full biweekly pay period" credited at the beginning of the next pay period.

Debt Collections—Waiver—Civilian Employees—Leave Payments—Excessive Leave Credited

The leave account of a civilian employee who has been erroneously credited with annual leave at a rate to which he is not entitled must be adjusted to correct the error immediately upon determination that an error was committed. If, on adjustment, the employee has sufficient leave credits to cover the adjustment, no overpayment of pay to which waiver under 5 U.S.C. 5584 would apply has occurred. If, on adjustment, he has insufficient leave credit to cover the adjustment, the resulting negative leave balance represents pay received to which he is not entitled, and, thus, is subject to possible waiver.

Matter of: Daniel F. Cejka—Accrual of Annual Leave—Temporary Disability Retired List, February 14, 1984:

This decision is in response to a request from a Disbursing Officer, Marine Corps Finance Center, on several questions concerning the proper rate at which annual leave may acrue under the provisions of 5 U.S.C. § 6303(a) to Daniel F. Cejka, as a civilian employee of the Finance Center.

BACKGROUND

Mr. Cejka, while serving on active duty in the Marine Corps in the grade of staff sergeant (E–6), suffered a service-connected disability and was transferred to the Temporary Disability Retired List, effective August 20, 1979. At that time, he had performed 7 years, 5 months and 19 days of active duty. On October 13, 1981, he received a Veterans Readjustment Appointment under the provisions of 5 C.F.R. Part 307, for civilian employment at the Marine Corps Finance Center. At his appointment, he was given credit for his active duty time and began to accrue annual leave at the rate of 6 hours a pay period.

The propriety of the administrative action crediting Mr. Cejka with his military service time has now been questioned. The submission points out that the provisions of 5 U.S.C. § 6303(a)(A), (B) and (C), limit the circumstances under which a retired servicemember may receive credit for active military service. As a result, it is suggested that Mr. Cejka has been receiving annual leave at the incorrect rate.

The agency has proposed changing his service computation date, and, thus, reducing Mr. Cejka's rate of leave accrual from 6 hours, to 4 hours, as well as reducing his accrued leave balance by the amount of the leave erroneously credited. It hesitates doing so since it is uncertain whether Mr. Cejka's status on the Temporary Disability Retired List is to be considered retirement under 5 U.S.C. § 6303 as that term is defined in 5 U.S.C. § 3501, due to the nature of the limited status and time that an individual may remain on that list.

Based on the foregoing, five questions are asked. The first three questions are:

1. Is a member on the Temporary Disability Retired List a "retired member of a uniformed service" under 5 U.S.C. § 6303 so as to preclude the crediting of prior active military service for annual leave purposes?

2. If the answer to 1 is in the negative, does the removal of a member's name from the Temporary Disability Retired List and placement on the Permanent Disability Retired List cause the prohibition against crediting prior active military service under 5 U.S.C. § 6303 to operate?

3. If the answer to 2 is in the affirmative, is the operative date the date the member is placed on the Temporary Disability Retired List or the date he is permanently retired for disability?

DECISION

The Temporary Disability Retired List (10 U.S.C. §§ 1202 and 1205), was established for the purpose of authorizing a limited retirement status for members of the Armed Forces who become unfit to perform military duty because of physical disability, but where such disability is not determined to be of a permanent nature, with the maximum period of retention on the list limited to 5 years. (10 U.S.C. § 1210(h)). Other than situations involving immediate transfers to the permanent disability retired list (10 U.S.C. § 1210(b), (c) and (d)), or separations from the service with severance pay (10 U.S.C. § 1210(e)), members whose names are removed from that list are returned to the active list either for the purpose of resuming active duty or to be retired for length of service under other provisions of law. See 47 Comp. Gen. 141 (1967), and 50 *id.* 677 (1971).

The law governing accrual of annual leave for civilian employment is contained in 5 U.S.C. § 6303. While active military service is creditable as years of service for leave accrual purposes, 5 U.S.C. § 6303(a)(A) provides, in part, that an employee who is a "retired member of a uniformed service," as defined in 5 U.S.C. § 3501, is entitled to be credited with all his active military service, but only if his retirement was for disability resulting from injury or disease received in line of duty as a direct result of armed conflict, or from an instrumentality of war incurred in line of duty during a period of war. If a servicemember's retirement was not for those reasons, subsection 6303(a)(B) provides that he only may be credited with that portion of his military service which was performed during war or in a campaign or expedition for which a campaign badge has been authorized.

For the purpose of 5 U.S.C. § 6303, the phrase "retired member of a uniformed service" is defined in 5 U.S.C. § 3501(a)(2) to mean:

> * * * a member * * * who is entitled, under statute, to retire, retirement, or retainer pay on account of his service as such a member.

While the above-quoted language of 5 U.S.C. § 3501 was introduced in Public Law 89-554, September 6, 1966, 80 Stat. 378, 428, as part of the codification of Title 5, United States Code, it was derived from section 101 of Public Law 88-448, August 19, 1964, 78 Stat. 484, 5 U.S.C. § 3101 (1964). In that latter provision, a member was retired if his retirement was identified as being "under any provision of law." In view of the fact that section 7 of Public Law 89-554, 80 Stat. 631, provides that the legislative purpose of the codification of title 5 was to restate, "without substantive change" the laws replaced, it is our view that the term "under statute" as used in 5 U.S.C. § 3501(a)(2) is to be given the same meaning as the phrase "under any provision of law."

In 31 Comp. Gen. 213 (1951), we considered, in part, the nature of a servicemember's status when he is transferred to the Temporary Disability Retired List from the active list. We ruled therein that, notwithstanding the fact that the presence of his name on that list did not make his retirement permanent, since the placement of his name on that list removes his name from the active list, "temporary retirement" is "retirement." See also *Captain John B. Turpit, USMCR Retired,* B-206133, February 1, 1983, in which we similarly construed the language contained in 10 U.S.C. § 687(b)(4) limiting entitlement to readjustment pay.

Based on the foregoing, it is our view that for the purpose of 5 U.S.C. § 6303, an individual whose name is on the Temporary Disability Retired List is a retired member within the meaning of 5 U.S.C. § 3501(a)(2). Therefore, so long as his name is carried on that list, he is precluded from receiving credit for his military service for annual leave accrual purposes unless the cause of his disability meets the criteria stated in 5 U.S.C. § 6303(a)(A)(i) or (ii), or such service qualified under 5 U.S.C. § 6303(a)(B) or (C). Since Mr. Cejka's disability did not meet any of these criteria, his active military service may not be credited for annual leave purposes. Therefore, the first question is answered yes and the second and third questions require no answer.

The last two questions asked are:

4. If the answer to 1 is in the affirmative, does the subsequent removal of the member's name from the Temporary Disability Retired List remove the impediment to crediting active military service under 5 U.S.C. § 6303?

5. If the answer to 4 is in the affirmative, is the impediment removed effective with removal from the Temporary Disability Retired List or retroactively effective to the appointment as a civilian employee?

As previously observed, upon the removal of a servicemember's name from the Temporary Disability Retired List, he is either retired for permanent disability, separated from the service with severance pay, or returned to the active list for the purpose of resuming full-time active duty or to be retired for length of service. Thus, in the facts of the present case, only one condition following removal of Mr. Cejka's name from the Temporary Disability Retired List would permit him to credit his military service for annual leave accrual purposes as a civilian employee. That would be separation from the service with severance pay. Question 4 is answered accordingly.

As to the question of whether removal of his name from the Temporary Disability Retired List would remove the impediment of crediting military service time effective the date of removal or retroactively to the date of his appointment to his civilian position, it may only be credited prospectively from the date of removal of his name from that list. Under the provisions of 5 U.S.C. § 6303, the basis for crediting annual leave at one of the rates specified in subsections (a)(1)-(3), is predicated on the employee's accumulation of the specified number of years of creditable service. The rate to be applied to "each full biweekly pay period" is determined at the beginning of each upcoming biweekly pay period. Thus, until an employee has acquired sufficient years of creditable service to qualify for annual leave accrual under subsections 6303(a) (2) or (3), either by passage of time as a civilian employee, or lump-sum credit for other Federal service under some other provision of law, or a combination thereof, his rate of annual leave accrual is limited to the rate specified in subsection 6303(a)(1).

In Mr. Cejka's case, during any biweekly period of Federal employment while he is in a military retired status, either temporary or permanent, he may not be credited with his military service time. Since his civilian employment began on October 13, 1981, he is presently only entitled to accumulate annual leave at the rate of 4 hours per biweekly pay period, which condition would continue until his nonmilitary creditable service equals 3 years, or he becomes entitled to credit his military service time (separation with severance pay), whichever occurs first. Therefore, since he has only been entitled to accumulate leave at the rate of 4 hours per biweekly pay period, all annual leave credited to his account since October 13, 1981, in excess of that rate (2 hours per biweekly pay period), is to be subtracted from his leave balance.

While not addressed in the submission, since the matter of improper accumulation of annual leave apparently occurred solely due to administrative error, the issue of possible waiver should be considered. We have held that under the provisions of 5 U.S.C. § 5584, where an employee's leave account must be adjusted to correct a previous error and the employee has sufficient leave to his credit to cover the adjustment, there is no overpayment of pay which may be considered for waiver. B-176020, August 4, 1972. Where, however, at adjustment of his leave balance, the employee has insufficient leave to his credit to cover the adjustment, then to the extent that such leave reduction produces a negative leave balance, he has received pay to which he is not entitled. Therefore, only that leave which is in excess of his leave balance at the time of adjustment is subject to possible waiver. *John P. Mitchell*, B-180010.12, March 8, 1979.

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GENERAL ACCOUNTING OFFICE

believe that an award to Pacific Sky in response to its proposal would not comply with the requirement for full and open competition in government procurement, 10 U.S.C.A. § 2304(a) (West Supp. 1985), since other firms have not had an opportunity to submit offers on the basis of the Hamilton Standard drawing used by Pacific Sky. Consequently, we are recommending that the Air Force issue a new competitive solicitation and terminate Hamilton Standard's contract, if time permits. We note that since Hamilton Standard purchases components and merely assembles the equipment, termination costs should be relatively low.

If the agency has insufficient time to complete a competitive procurement, as is apparently the case from the Air Force's representations regarding necessary delivery schedules, the Air Force should negotiate a contract in response to Pacific Sky's original offer, assuming that it otherwise finds the firm responsible. Finally, if in negotiating with Pacific Sky, the Air Force is unable to obtain a satisfactory delivery schedule at the offered price, continuing Hamilton Standard's contract would be appropriate. In that case, Pacific Sky would be entitled to its proposal costs and expenses of pursuing the protest.

We reconsider our prior decision and sustain the protest.

[B-221120]

Leaves of Absence—Annual—Accrual—Crediting Basis—Military Service—Temporary Disability Retired List Status Effect

A former member of the United States Navy who was separated from the service with disability severance pay (10 U.S.C. 1212), has been a civilian employee of the government since 1960. At the time of civilian appointment, he was credited with 6 years, 6 months and 10 days of military years of service for annual leave accrual purposes (5 U.S.C. 6303), which included 3 years, 7 months and 10 days of time spent on the Temporary Disability Retired List (TDRL). The TDRL time is not properly creditable for this purpose. Under 5 U.S.C. 6303(a), and 5 U.S.C. 8332(c)(1)(A), while military service is creditable, the term "military service" is defined in 5 U.S.C. 8331(13) to mean "honorable active service." Since placement of a military member's name on the TDRL list removes his name from the active duty list, he is in a retirement status during that time. Therefore, the employee's civilian service computation date must be reestablished and his annual leave balance adjusted.

Matter of: Edgar K. Epp—Accrual of Annual Leave—Temporary Disability Retired List, Apr. 2, 1986:

This decision is in response to a request from the Chief, Personnel Management Office, Bureau of Reclamation, Department of the Interior. The question involves the proper crediting of military service time for civil service annual leave accrual and retirement purposes in the case of Mr. Edgar K. Epp.

BACKGROUND

Mr. Epp entered onto active duty in the United States Navy on May 31, 1951. As a result of a service-connected injury, he was transferred to the Temporary Disability Retired List (TDRL), effective May 1, 1954. At that time, he had performed 2 years, 11 months and 0 days of active duty. On December 10, 1957, his name was removed from the TDRL and he was separated from the Navy with disability severance pay authorized under 10 U.S.C. § 1212. His total military time upon separation, both active and time spent on the TDRL, was 6 years, 6 months and 10 days.

In 1960, Mr. Epp was appointed to a civilian position in the Federal Government. Shortly after his appointment, he was credited with the full 6 years, 6 months and 10 days military time and began to accrue annual leave at the rate of 6 hours a pay period. And, after having performed approximately 8 years and 6 months of civilian service, he began to accrue annual leave at the rate of 8 hours a pay period.

The agency contends that the time Mr. Epp spent on the TDRL (3 years, 7 months and 10 days), is not creditable in establishing an employee's service computation date for annual leave accrual, or for civil service retirement purposes. Mr. Epp, on the other hand, claims that the additional service credits he received were credited based on a decision of this Office which was noticed several years after he entered civilian service. He brought the decision to the attention of his personnel officer who agreed that it applied to his situation. He is unable to locate that decision.

The point made by the submitting official is that if this additional service time is properly creditable, Mr. Epp will soon be eligible for optional civil service retirement. If the additional service time is not properly creditable, then his service computation data would have to be reestablished. This, in turn, would require an adjustment of and a reduction in his annual leave balance as well as delaying his eligibility for optional retirement. The submission goes on to state that while agency research has failed to uncover a decision by this Office which would support Mr. Epp's position, a recent decision, B-212738, February 14, 1984 (published as *Daniel F. Cejka,* 63 Comp. Gen. 210 (1984)), while not specifically on point, tends to support the agency's view that time spent on the TDRL is not creditable service for leave and retirement.

DECISION

The law governing accrual of annual leave, which was in effect when Mr. Epp was appointed to a civilian position, was contained in 5 U.S.C. § 2062 (1958), and is presently codified as 5 U.S.C. § 6303 (1982). Since the governing laws have remained virtually unchanged in substance since then, all reference will be to the current Code.

Section 6303(a) of Title 5, United States Code, provides in part:

> (a) * * * In determining years of service, an employee is entitled to credit for all service creditable under section 8332 of this title * * *.

Section 8332(c) (1)(A) of Title 5, United States Code, provides in part:

> * * * the service of an individual who first becomes an employee before October 1, 1982, shall include credit for each period of military service performed before the date of the separation on which the entitlement to an annuity under this subchapter is based * * *

The term "military service" is defined in 5 U.S.C. § 8331(13) to mean "honorable active service in the armed forces."

Thus, for the provisions of 5 U.S.C. § 6303, military service time which is creditable to establish the rate at which an individual is authorized to accrue annual leave as a civilian employee is limited to "honorable active service." In this connection, 10 U.S.C. 101 (22) and (24), when read together, define military active service to mean,

> * * * full-time duty in the active military service of the United States. It includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned.

These are the governing basic provisions of law. Based on the sketchy information provided by Mr. Epp, we have researched our decisions in which the above-quoted provisions or their antecedent provisions were cited in an effort to locate the decision to which he referred. We have not found any decision which characterized time spent in an inactive or military retirement status, such as time spent on the TDRL, as constituting military active service as that term is defined in 5 U.S.C. § 8331(13), or in 10 U.S.C. § 101 (22) and (24). In fact, the decisions which we did find indicated the contrary position.

In 31 Comp. Gen. 213 (1951), we considered, in part, the nature of a military member's status while his name is on the TDRL. We ruled therein that, notwithstanding the fact that the presence of his name on that list did not make his retirement permanent, since, the placement of his name on that list removes his name from the active duty list, "temporary retirement" is "retirement." That ruling has been consistently followed. See 36 Comp. Gen. 628 (1957); 38 Comp. Gen. 268 (1958); and 47 Comp. Gen. 141 (1967). See also, Captain *John B. Turpit, USMCR, Retired,* B-206133, February 1, 1983, in which the language contained in 10 U.S.C. § 687(b)(4), limiting entitlement to readjustment pay was similarly construed.

Mr. Epp and the agency official who authorized the crediting of additional military time may have misread a decision in which the term "years of service" appeared, since that term is used in 10 U.S.C. § 1212, as well as 5 U.S.C. § 6303. If so, such a reading was in error. Under 5 U.S.C. § 6303, "years of service" is comprised of active military service and service as a civilian employee of the government. Since there is no provision of law stating that military retired time on the TDRL qualifies as active service for section 6303 purposes, it may not be so used. Therefore, since Mr. Epp had only served on active military duty a total of 2 years, 11 months and 0 days prior to his appointment as a civilian employee, that is the maximum military service time creditable to him for annual leave accrual purposes. Accordingly, his service computation date is to be reestablished and his annual leave balance adjusted as necessary.

With regard to civil service retirement, matters involving determinations of years of service creditable for that purpose come within the exclusive jurisdiction of the Office of Personnel Management (OPM). However, it is to be observed that since the definition of "military service" under 5 U.S.C. § 8331(13) is also used to establish civil service retirement years of service, we are not aware of any basis to conclude that OPM would permit the inclusion of TDRL time for that purpose. See, in this connection, 5 C.F.R. Part 831, Subpart C (1985).